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*H. Brit. Parliament, House of Lords,*

**CASES**

DECIDED IN

**THE HOUSE OF LORDS,**

ON APPEAL

**FROM THE COURTS OF SCOTLAND,**

FROM 19 MARCH TO 5 JUNE 1835.

---

REPORTED BY

PATRICK SHAW, ESQ. ADVOCATE,

AND

CHARLES HOPE MACLEAN, ESQ. BARRISTER AT LAW.

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VOLUME I.

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AND

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**CASES**  
**DECIDED IN THE HOUSE OF LORDS,**  
**ON APPEAL FROM THE**  
**COURTS OF SCOTLAND,**  
**1835.**

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[19th *March* 1835.]

**Lord ELIBANK** and his Commissioners, Appellants.—  
*Murray.*

**PATRICK MURRAY, Esq.,** Respondent.— *Sir John*  
*Campbell — Smythe.*

*Entail*—The prohibitory clauses of an entail being directed against the institute and the other heirs of tailzie, but the irritant clause being only directed against the debts and deeds of “the said heirs of tailzie,” without specifying the institute. Held (affirming the judgment of the Court of Session) that it was lawful for the institute to sell.

**PATRICK** Lord Elibank, by bond and deed of tailzie dated 9th of November 1776, granted procuratory for resigning all and whole his lands of Simprim, Maegill, and others therein mentioned, in favour of and for new infestment of the same, to Patrick Murray the respondent, and the heirs male of his body; whom failing, to

1st Division.

Ld. Corehouse.



LORD  
ELIBANK  
and others  
v.  
MURRAY.

19th Mar. 1835.

a series of substitutes, and the heirs male of their bodies; whom all failing, to the entailer's own nearest heirs whomsoever.

This deed contained, among others, the following prohibitions: — “ That it shall noways be lawful to or in  
“ the power of the said Patrick Murray, or of any of the  
“ other heirs of taillie and substitutes above named, to  
“ innovate, alter, or infringe this present taillie, or the  
“ order of succession hereby established, or to be esta-  
“ blished by any nomination or other writ to be made  
“ by us, or to do or grant any other act or deed that  
“ may infer any alteration, innovation, or change of the  
“ same, directly or indirectly,” excepting always power to alter the order of succession, so as to exclude heirs forfeited or attainted: “ And with and under this  
“ limitation and restriction also, that it shall not be lawful  
“ to or in the power of the said Patrick Murray, and our  
“ other heirs of taillie above specified, or any of them,  
“ to sell, dispone, alienate, burden, dilapidate, or put  
“ away the lands and others above written, or any part  
“ thereof, either irredeemably or under reversion, or to  
“ contract debts, grant bonds, or any other security, or  
“ to do any act, civil or criminal, that shall be the  
“ ground of any adjudication, eviction, or forfeiture of  
“ the aforesaid lands and estates, or any part thereof.”

These prohibitions were fenced with the following irritant and resolute clauses: — “ With and under these  
“ irritancies following, as it is hereby expressly provided  
“ and declared, that if the said Patrick Murray, or any  
“ other of the heirs of taillie above specified, shall con-  
“ travene any of the conditions, provisions, and limita-  
“ tions herein contained, either by failing and neglecting

“ to obey and perform the said conditions and provisions,  
 “ and every one of them, or by acting contrary to the  
 “ said restrictions and limitations, or any of them,  
 “ excepting as is above excepted, that in any of these  
 “ cases the person so contravening, by failing and omit-  
 “ ting to obey the said conditions, or acting contrary to  
 “ the said limitations, or any of them, shall, for himself  
 “ only, forfeit, omit, and lose all right, title, and interest  
 “ to the foresaid lands and estates, in the same manner  
 “ as if the contravener were naturally dead, and the  
 “ right thereof shall devolve upon the next heir of  
 “ taillie,” &c. — “ And it is also hereby expressly pro-  
 “ vided and declared, that all the debts and deeds of the  
 “ said heirs of taillie, or either of them, contracted,  
 “ made, or granted, as well before as after their succes-  
 “ sion to the aforesaid lands and estates, in contraven-  
 “ tion of this present taillie, and provisions, conditions,  
 “ restrictions, and limitations herein contained, and all  
 “ adjudications or other legal executions or diligences  
 “ that shall happen to be obtained or used against the  
 “ fee and property of the said lands and estates, or any  
 “ part thereof, upon the same, shall not only be void  
 “ and null, with all that may or shall follow thereon, in  
 “ so far as they might anyways affect the said lands and  
 “ estates, but also the heirs of taillie respectively, upon  
 “ whose debts and deeds such adjudications have pro-  
 “ ceeded, shall ipso facto forfeit their right and title to  
 “ the said lands and estates, and the same shall devolve  
 “ to the next heir of taillie,” &c.

LORD  
 ELIBANK  
 and others  
 v.  
 MURRAY.  
 19th Mar. 1835.

On the death of the entailer, in the year 1778, Mr. Murray completed titles, by charter and infeftment, as institute under this deed ; and, as he was not an heir

LORD  
ELIBANK  
and others

v.  
MURRAY.

19th Mar. 1835.

*alioqui successurus*, it necessarily continued ever since to be his sole and exclusive title of possession.

Mr. Murray being married, and having no heirs male of his body, but only daughters, and having been advised, that in consequence of a defect in the irritant clause, the entail, in so far as regards him personally, was altogether inoperative to create a limitation in his right; and that whatever might be its effect as against the substitutes, it contained nothing to prevent him from selling or otherwise disposing of the whole or any part of the lands to which it refers, as freely, in all respects, as if he were the fee-simple proprietor, caused the lands to be advertized in the year 1832, to be sold by public auction within the Royal Exchange Coffee House of Edinburgh, and gave intimation thereof to the agent of the Right Honorable Alexander Lord Elibank, the grand nephew of the entailer, and the next heir substitute of entail failing the heirs male of his, Mr. Murray's, own body, of his intention to sell the lands as soon as he could find a purchaser, and that he was actually in treaty for the sale of them. His intentions to do so were no sooner made known, than he was met by a declarator of irritancy, at the instance of Alexander Lord Elibank, concluding to have it found and declared, " that the defender is, " by the foresaid deed of entail, specially prohibited " from selling the lands and estates before mentioned, " or any part thereof, and is legally debarred " from selling the same, or granting any obligation, " missive disposition, or other deed of sale, or any " deed or right, in whatever form the same may " be conceived, whereby the said lands and estates

“ may be anywise evicted or carried off, to the pre-  
 “ judice of the pursuer, or any of the other substitutes  
 “ in the said entail ; and it ought and should be found  
 “ and declared by decree foresaid, that any such  
 “ missive obligation, disposition, or other deed or right,  
 “ in whatever form the same may be conceived, convey-  
 “ ing or entered into for the purpose of conveying away  
 “ the said lands, or any part thereof, to the prejudice  
 “ of the pursuer and the other heirs substitute of entail,  
 “ whether already contracted, made, or granted, or to  
 “ be contracted, made, or granted, by the defender, is  
 “ null and void, and incapable of affecting the said  
 “ lands and estates ; and that by contracting, making,  
 “ or granting such obligation, missive disposition, or  
 “ other deed or right for affecting, evicting, or carrying  
 “ off the same, to the prejudice of the pursuer, or any  
 “ of the other substitutes in the said entail, the defender  
 “ has already forfeited, or upon contracting, making,  
 “ or granting such obligation, missive disposition, or  
 “ other deed or right for affecting, evicting, or carrying  
 “ off the said lands and estates, or any part thereof,  
 “ will forfeit, lose, or amit all right, title, and interest  
 “ in the said lands and estates.”

LORD  
 ELIBANK  
 and others  
 v.  
 MURRAY.

19th Mar. 1835.

Mr. Murray founded his defences to this action on  
 the defective nature of the irritant clause : and pleaded,  
 that the irritant clause applies only to the debts and  
 deeds of the heirs of taillie, and he is not one of the  
 heirs, but the institute in the entail,—the lands being  
 conveyed to him directly, and not as substitute to any  
 other person ; and further, that the irritant clause does  
 not apply to any disposition or deed of alienation of the  
 entailed estate, but only to debts and deeds of that

LORD  
ELIBANK  
and others  
v.  
MURRAY.

19th Mar. 1835.

description upon which adjudications or other legal diligences may be deduced; and, upon these grounds, he claimed to be entitled under the entail to sell or alienate the whole or any part of the estate, without incurring thereby a forfeiture of any of his rights and interests.

Before this action came to be disposed of, Mr. Murray, having completed a transaction for the sale of the whole of the entailed lands, raised a counter action of declarator against Lord Elibank, and the other substitute heirs of entail; in which, on the ground of the defects in the irritant clause, as set forth in his defences to the previous action at his Lordship's instance against him, he concluded to have it found and declared, not only that he had full and undoubted right and power effectually to sell and alienate the several lands and others contained in the before-mentioned bond of taillie, to any person or persons, in any way he may think proper, for a price, or other onerous consideration, and to grant and execute all deeds and writings whatsoever, which may be requisite and necessary for effectually conveying the lands so sold to such person or persons purchasing the same; but also, “ that, upon selling or alienating the whole or any  
“ part or parts of the said several lands and others, the  
“ pursuer will have the sole and exclusive right to the  
“ said price or prices, or other consideration, and will  
“ have power to grant a valid and sufficient discharge  
“ for the same to the purchaser or purchasers; that  
“ the said price or prices, or other consideration, will  
“ become the pursuer's absolute property; that he will  
“ have full power to use and dispose of the same at  
“ pleasure; and that he will not lie under any obligation to invest, employ, or lay out the same, or any part

“ thereof, in the purchase or on the security of any  
 “ other lands or estate, or otherwise, for the benefit of  
 “ the defenders, or any of them; and that they will  
 “ have no right or title to interfere with or control the  
 “ pursuer in the use or disposal of the said price or  
 “ prices, or other consideration, in any manner of way:  
 “ And also, that the defenders, or any of them, will  
 “ have no claim or demand of any description against  
 “ the pursuer, or against his heirs and representatives,  
 “ in the event of his death, for or in respect of the sales  
 “ or alienations which may be made, or dispositions or  
 “ other writings which may be granted or executed by  
 “ the pursuer; or adjudications or other diligence that  
 “ may be deduced thereon; or for or in respect of the  
 “ pursuer using or disposing, at his pleasure, of the said  
 “ price or prices, or other consideration.”

LORD  
 ELIBANK  
 and others  
 v.  
 MURRAY.

19th Mar. 1835.

Upon advising the closed record and mutual cases, Lord Corehouse, Ordinary, reported them to the Court, and issued this note: —

“ The Lord Ordinary reports this case, not on ac-  
 “ count of any doubt which he entertains on the point  
 “ at issue, but because it is of importance to the parties  
 “ that it should be speedily determined by the Court  
 “ whether Mr. Murray, the institute in possession, is  
 “ in a situation to give a valid title to the person who  
 “ has agreed to purchase the estate.”

The Trustees of the late Earl of Strathmore, and the late Sir John Marjoribanks of Lees, Bart., the parties to whom the estates of Simprim and Maegill were sold by the respondent, had in the meantime raised actions of suspension in the Court of Session of threatened charges for payment of the price of their respective purchases;

LORD  
ELIBANK  
and others  
v.  
MURRAY.

19th Mar. 1835.

and a record having been closed in both of these suspensions, the Lord Ordinary of this date made avizandum with them to the First Division of the Court.

On the 2d of July 1833, their Lordships of the First Division pronounced this interlocutor :—“ Having considered the record and revised cases for the parties in the conjoined actions of declarator at the instance of Lord Elibank and Commissioners against Patrick Murray of Simprim, and at the instance of the said Patrick Murray against the said Lord Elibank and others, and having also considered the records in the actions of suspension at the instance of the trustees of the late Earl of Strathmore, and the trustees of the late Sir John Marjoribanks, against the said Patrick Murray, also reported by the Lord Ordinary, of consent conjoin all these processes, and in the conjoined actions of declarator and suspension, find that the entail of the estates of Simprim and Maegill does not contain any irritant clause applicable to the debts and deeds of the said Patrick Murray, as the institute in the said entail; and that the sales made by the said Patrick Murray of the lands contained in the said entail are valid and effectual; and in respect of the said defect in the entail, find in terms of the conclusions of the libel at the instance of the said Patrick Murray, and decern and declare accordingly; assoilzie the said Patrick Murray, defender, from the whole conclusions of the libel at the instance of the said Lord Elibank, and decern; repel the reasons of suspension stated for the said Lord Strathmore’s trustees, and for the said Sir John Marjoribanks’ trustees; find



“ the letters orderly proceeded, and decern ; find no  
 “ expences due to any of the parties.”<sup>1</sup>

LORD  
 ELIBANK  
 and others  
 v.  
 MURRAY.

Against this interlocutor, in which the whole Court were unanimously agreed, Lord Elibank appealed. The trustees of the Earl of Strathmore and the trustees of the late Sir John Marjoribanks, and who were the purchasers, also appealed.

19th Mar. 1835.

*Appellants.*—According to the terms of the statute and the language generally used in deeds of entail, the term “ heirs ” is applicable to all members of tailzie, without distinction between the institute and substitute, and there is no reason to hold, from any part of the deed of entail in question, that the tailzier meant to make any distinction between Patrick Murray and the other members of tailzie, by exempting him from the limitations imposed on the others ; there are many deeds of entail on record where the expression is “ John  
 “ such a one (the institute), and the other heirs of  
 “ entail.”

A deed of entail need not be drawn up in any particular technical words or form in order to render it effectual ; provided the requisite clauses are inserted, and are sufficiently distinct to convey his meaning, the entailer may adopt any order and any form of words he chooses. Whatever may be the sense in which the term “ heirs ” is in the general case to be construed, it will be sufficient to comprehend the institute, if either by a special clause, *de interpretatione verborum*, it is declared to be used by the entailer to signify the institute as well as those called after him to the succession, or if this is

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<sup>1</sup> 11 Shaw, Dunlop, and Bell, 858.

LORD  
ELIBANK  
and others  
v.  
MURRAY.  

---

19th Mar. 1835.

made perfectly clear and certain by the manner in which the word is used in the different parts of the deed. There is nothing to prevent the maker of a deed of entail from using any word either in a more confined or more comprehensive sense than its legal or ordinary one, and all that is necessary to its being received in that sense is, that it should be quite clear that such was the sense in which it was used, and the meaning which was by it intended to be conveyed; and were the maker of an entail by a special clause to declare, that certain words therein were used by him in order to signify a particular thing therein also clearly stated, these words would, whenever they occurred in the deed, be construed in the sense in which they were so declared to be used: in short, the general conventional or technical legal meaning of words must give way to what is proved to be the meaning of the person using them.

The principles on which the Court of Session has always acted, are stated by the Bench in the case of *Douglas v. Glassford*, 14th November 1823, and, in conformity with them, subsequent cases have been disposed of. The words used by their Lordships are: “no  
“doubt entails are *strictissimi juris*; that doctrine is  
“founded on common law and common sense; but it  
“has also its limits in common sense,—you cannot hold  
“words *pro non scriptis*. The statute lays down no  
“*verba solemnia* with which to express the entailer’s  
“intention; I may use any words that I choose, if they  
“are but intelligible and unequivocal. If the meaning  
“can be understood, it will be given effect to, and the  
“Court will not inquire whether it might or might not  
“have been better expressed.”

By the manner in which the word “heirs” is used in the entail of the estates of Simprim and Maegill, and the whole frame and structure of the deed, it is rendered clear beyond all doubt, and is substantially declared, that the maker of the entail used it for the purpose of designating, and understood that it would designate, not only the heirs of entail substituted and called to the succession after the respondent, Patrick Murray the institute, but also Patrick Murray himself; and the construing it so as not to include Patrick Murray would be to resort to an interpretation by implication, while the not putting that meaning upon it would frustrate the will of the entailer by allowing what may be the technical meaning of the word to overrule the entailer’s meaning of it, which is not warranted by any principle of construction hitherto applied to deeds of entail.

LORD  
ELIBANK  
and others  
vs.  
MURRAY.

19th Mar. 1835.

It appears unequivocally and emphatically proved that by the word “heirs” the entailer meant to designate and did designate Patrick Murray the institute, as well as the substitutes in the entail; and that, in particular, he used it in that sense in declaring an irritancy of all the debts and deeds of the said heirs of tailzie or either of them, contracted, made, or granted in contravention of or against the prohibitions or conditions of the entail; as if it had been specially set forth in a substantive clause or provision, that the entailer had, under the word “heirs,” included or was to include the institute as well as the substitute heirs, and that it was to be received in that sense.

The peculiar frame of the deed, and the manner in which the different classes of its provisions are introduced

LORD  
ELIBANK  
and others  
v.  
MURRAY.  
—  
19th Mar. 1835.

by the words “ with and under,” and the form in which the clauses so introduced are drawn, as respects the introduction of the word “ heirs,” and the way in which that bears upon the particular clause providing the irritancies, forfeiting the rights of the contravener of the prohibitions, and voiding the deeds of contravention themselves, which is drawn as one clause, all show, that under the term “ heirs” the entailer meant to include and to designate the respondent, Patrick Murray the institute, as well as the substitutes. Nor will it be overlooked that, in several of the enabling provisions of the deed which are introduced as exceptions from the prohibitory provisions, (which are indisputably directed against Patrick Murray the institute,) the word “ heirs” alone is used, proving very distinctly that “ heirs” was used to designate the institute as well as the substitute heirs; for it is impossible to suppose that the same privileges were not to be conferred on the institute as the substitutes: and not only so, but there is a whole series of other clauses, such as the assignation to writs, and the clause providing for the recording the entail, and others, where the word “ heirs” alone is used, and which are demonstrative that it was used as including the institute as well as the substitute heirs.

The entailer’s meaning of the word “ heirs” is therefore rendered quite clear and unequivocal. He has, by the terms of the deed, supplied as clear and express a translation of it as if there had been a substantive clause declaring the sense in which he used it, and required that it should be understood; and consequently, in construing the entail in question, the word “ heirs” in the irritant clause must be taken as including the institute,

Patrick Murray, and affecting him as well as the substitute heirs.<sup>1</sup>

LORD  
ELIBANK  
and others  
v.  
MURRAY.

*Respondent.*<sup>2</sup>—The respondent being the institute in possession under an entail containing no irritant clause applicable to his debts and deeds, has, notwithstanding the prohibitions, full right to sell the entailed lands, and power to confer a valid title on an onerous purchaser. 19th Mar. 1835.

The provisions of the irritant clause in this entail are directed exclusively against the debts and deeds “of the said heirs of tailzie, or either of them,” and contain no declaration whatever applicable to the respondent, who is the institute and nominatim disponee, and who therefore, as far as that deed is concerned, must be held to stand precisely in the same situation as a party in possession under an entail, which from a total want of an irritant clause has not the protection of the statute of 1685; for it may now be assumed, as a point of settled law, that the restraints imposed upon heirs of entail cannot be extended by implication so as to affect the institute, if he be not expressly fettered. This rule is founded on a very obvious principle, derived from a consideration of the difference between the character of an institute and of an heir. The institute is not in a

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<sup>1</sup> *Appellant's Authorities*.—4 Stair, 183, (Leslie, Elch. Taillie, No. 49.); Edmonstone of Duntreath, 24 Nov. 1769, (Mor. 4409); Wellwood, 23 Feb. 1791, (Mor. 15,463); Baillie, 11 July 1734, (Mor. 15,500); Kemp, 28 Jan. 1779, (Mor. 15,528); Elch. Notes on Stair, p. 114; 3 Ersk. 8, 26; Dick v. Drysdale, 14 Jan. 1812, (F.C.); Barclay v. Adam, 18 May 1821, (1 Shaw's App. Cases, p. 24; 2 Mackenzie on the Statutes, p. 484, Fol. Ed. 1722); Morehead v. Morehead, 2 July 1833, reversed in the House of Lords, 31 March 1835; vide next case.

<sup>2</sup> The House did not call on the respondent's counsel. The following argument is taken from his appeal case.

LORD  
ELIBANK  
and others

v.  
MURRAY.

19th Mar. 1835.

legal and technical sense an heir at all; his right is not completed, like that of the heir, by the intervention of a service, but being a simple disponent he takes directly as singular successor of the grantee. It is absolutely requisite, in order to bind the institute effectually, that he should be either expressly named, or legally described as one of the persons to whom the restrictive clauses are meant to apply, otherwise no restraint will be created, however clear the intention of the entailer may appear to be. This intention has always been justly considered an important element in the construction of an entail, in cases where a question has arisen between two parties, as to which of them is entitled to take up the succession; but in cases like the present, where there is an individual unquestionably preferred in the first instance, and legally and completely vested in the fee, a very different rule prevails in the construction of the subsequent clauses which go to limit that fee in his person. Where a question arises as to the existence of a valid and effectual prohibition of any kind, it must be shown, not only that the particular act is forbidden, but also that the prohibition is sufficiently guarded by corresponding irritant and resolute clauses, the absence of either of which will be fatal to the entail. Are or are not the fetters of this entail so imposed as effectually to include the respondent, who is not an heir, but the institute or disponent? The irritant clause in this entail does not extend to the institute, but is directed exclusively against the heirs of tailie; and its terms cannot be stretched beyond their literal meaning by any implication of the entailer's intention. The prohibitory clause applies generally, and in all its material provisions, "to the said Patrick Murray

“ and the other heirs of taillie,” and the resolute clause is in the same terms. But the irritant clause is directed only against the debts and deeds “ of the said heirs of “ taillie, or either of them,” there being in it no declaration to render null and void any act done by the institute contrary to the prohibitions of the entail; and a special resolute clause immediately following the irritant is in like manner limited in its application to “ the said heirs of taillie.” If the irritant clause of the present entail be neither directly applicable, nor capable by any sound legal construction of being applied, to the acts of the institute, it must be held that, in so far as he is concerned, the entail is not complete in terms of the statute; and that he stands in precisely the same situation as if there had been no irritant clause of any description; consequently the prohibitions which the deed contains cannot affect him, nor deprive him of the power, flowing naturally from his right of property, to sell or otherwise dispose of the entailed estate.

Upon the authority of the late decisions in the cases of *Tillicoultry*<sup>1</sup> and *Ascog*<sup>2</sup>, where it was laid down, in the broadest and most unqualified manner, that, if an entail does not contain proper irritant and resolute clauses in terms of the act 1685, the substitutes have no redress against the onerous deeds of the party in possession, the respondent having sold the entailed estate, has now the exclusive and uncontrolled right to the purchase

LORD  
ELIBANK  
and others  
v.  
MURRAY.

19th Mar. 1895.

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<sup>1</sup> *Bruce v. Bruce*, 15 Jan. 1799, (Mor. 15,539).

<sup>2</sup> *Stewart v. Fullarton*, 23 Feb. 1827, 3 Shaw & Dunlop, p. 418, and p. 396, new edit.; reversed in House of Lords, 16th July 1830, 4 Wilson & Shaw, p. 196.



LORD  
ELIBANK  
and others  
v  
MURRAY.

19th Mar. 1835.

money or price received by him as the consideration of the sale, and power to dispose of it as his own property; and he is under no obligation to re-invest or lay it out in the purchase or on the security of any other lands for the benefit of the substitute heirs; nor is he liable to any claim or demand whatever at their instance for damages or reparation on account of the sale.

A general principle of law is established by the above decisions, depending upon no specialty in the circumstances of each individual case, but universally applicable in every instance where the prohibitions cannot be enforced from a want of any of the statutory requisites.<sup>1</sup>

LORD BROUGHAM:—My Lords, I think this case is so plain that there is no necessity for calling upon the learned counsel for the respondent. It differs from a number of other cases decided in Scotland in one respect, and one only. I am not aware that in any former case there has arisen a controversy respecting the omission of words sufficient to fetter the institute in one of the restrictive clauses, namely, the irritant clause,—his name, or a direct reference to

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<sup>1</sup> *Respondent's Authorities.*—3 Ersk. 8, 31; Edmonstone of Duntreath, 24 Nov. 1769, (Mor. 4409); Leslie v. Leslie, 1752, (Elch. Taillie, No. 49); Erskines v. Hay Balfour, 14 Feb. 1758, (Mor. 4406); Gordon v. Lindsay Hay, &c., 8 July 1776, (Mor. App. Taillie, No. 2.); Menzies v. Menzies, 25 June 1785, (Mor. 15,436); Millwood v. Millwood, &c., 23 Feb. 1791, (Bell's Cases, p. 191, Mor. 15,463); Marchioness of Titchfield v. Cuming, 22 May 1798, (Mor. 15,467); Miller v. Cathcart, 12 Feb. 1799, (Mor. 15,471); Steel v. Steel, 12 May 1814, (F.C. and Dow's Reports, vol. v. p. 62); Douglas and Co. v. Glassford; 14 May 1823, (House of Lords, 10 June 1825, 1 W. & S.); Syme v. Dickson, 27 Feb. 1799, (Mor. 15,473); Bruce v. Bruce, 15 Jan. 1799, (Mor. 15,539); Earl of Breadalbane v. Campbell, 1812.

him by implication, (by which I mean direct and necessary implication,) having occurred in the others of those restrictive clauses. In the Duntreath case<sup>1</sup> he was not named in any one, either the prohibitory, the irritant, or the resolute clause. In the Dougalston case<sup>2</sup> he was named in a way to which I will presently advert further. In the Findrassie case<sup>3</sup> he was not named; and I am not aware of any case in which the question has precisely arisen which we have here. But in principle there cannot be the slightest difficulty in the application of the authority of those cases to the present. The institute being named in the introductory part of the deed, and in the dispositive clause,—being named in the prohibitory clause,—being named in the resolute clause,—but not being named in the irritant clause, the question is, whether that irritant clause is sufficient, the institute being named before? or whether it is insufficient, because he is not named in that clause? I am not aware of any former case in which the omission of the institute has not been in all the clauses; here it is in the irritant clause alone. There may be cases of that description of which I am not aware; but in this case there can be no doubt, unless we are to introduce a totally new law of entail from that which has been the law of real property in Scotland (not referring merely to the Duntreath case but to the cases previously decided), without one single exception in any finally adjudged case. I might almost say, without any dif-

LORD  
ELIBANK  
and others  
v.  
MURRAY.

19th Mar. 1835.

<sup>1</sup> Edmonstone, 24 Nov. 1769, (Mor. 4409.)

<sup>2</sup> Douglas and Co., 10 June 1825, 1 Wilson & Shaw, 323.

<sup>3</sup> Leslie, (No. 49, Elch. Taillie.)

LORD  
ELIBANK  
and others  
v.  
MURRAY.  
—  
19th Mar. 1835.

ference of any kind, the authority is uniform, (unless we regard the decision in the Court below, in the Duntreath case, which was reversed here,) that in order to make an effectual tailzie you must have all the three clauses; that you must have not only a valid prohibitory and a valid resolute clause, but a valid irritant clause also, and that it is in vain to attempt to fetter an heir of entail, or to fetter an institute, unless the entailer has completed the formal clauses, prohibiting him from alienating or contracting debt, or altering the order of succession, invalidating the prohibited act if done, and creating a forfeiture in the event of his contravening the prohibitions. He will in vain attempt to make his prohibition effectual if there be not a complete irritant clause, rendering null and void the contravening acts of either the substitute or institute. Possibly, my Lords, that law may be gathered from the entail act; it may also be contended that you may gather from the entail act the nicety of the Findrassie case, which requires that there should be a complete prohibition, and every act specified and fenced with irritation, in order to make it impossible for one of the persons in possession to contravene any one of the provisions: this inference from the statute is barely possible. Then we come to the Duntreath and other cases, which, perhaps, may not be said so entirely to flow from the act, and cannot be so logically gathered as the legitimate result of it,—cases laying down for fettering the institute rules which have now for above a century become the governing authorities in this branch of the law, having been uniformly upheld since this House, in the only instance

of a departure, recalled the Court below to the right path, and enforced the adoption of this proposition as the result of the law of Scotch entail,—that the institute or disponent is unlimited in his enjoyment of the title to the property, excepting he shall be validly fettered; that he is not of that class whom we technically know under the designation of heirs of tailzie, and cannot be struck at so as to be validly fettered by that which shall strike at and validly fetter heirs of tailzie eo nomine; that in order to fetter the institute, and prevent him from being an absolute fiar, it is necessary that you should do a great deal more than fetter heirs of entail as a class, for he and the heir of entail stand in contradistinction one to another. That is the principle laid down in the Duntreath case, as it had been in former cases, and it has been ever since followed in Scotland. It becomes then necessary to fetter him, either by his name, or by words distinctly and inevitably applying to him; as, for instance, “the said institute;” or by reference back to him, he having been previously named; or, if he has not been previously named, by such reference as shall leave no doubt that he is prohibited, that his estate is forfeited,—if he contravenes, his act of contravention void. That is the law of Scotland, as laid down in the course of decisions both below and here; below almost uniformly, here with perfect uniformity. There are no technical rules to show how you are to name him; nor are there any technical rules to show how you are to refer to him; nor any technical rules to designate in what way you are to class him and the others within the four corners of each given clause, if he is struck at and fettered in

LORD  
ELIBANK  
and others  
v.  
MURRAY.

19th Mar. 1835.

LORD  
ELIHANK  
and others  
v.  
MURRAY.  
19th Mar. 1835.

each clause ; but there must be either such a nomination of him, or such a designation of him, or such a reference to him, as to make it perfectly clear that he is struck at in the prohibitory clause, forfeited in the resolute clause, and his act contravening avoided in the irritant clause. The rule is laid down in these cases that it is not a sufficient mode of designating him ; it is not a valid mode of referring to him in any one of those three clauses, that you should refer to heirs of entail, because he is not an heir of entail. If the preceding part has spoken of the institute and the heirs of entail, it is not a valid mode that you should refer to him by saying “ said heirs of “ entail.” The Court must in such case refer the words “ said heirs of entail ” to the class ejusdem generis, namely, heirs of entail, and not the institute, though he may have been coupled with the heirs of entail ; just as if it mentions “ a man and three women,” and then in the reference made it says, “ the said three women ;” that will not refer to the man, although he was involved together with the third woman by the conjunctive proposition. The institute and heirs of entail being introduced, the reference afterwards by the words “ the said “ heirs of entail ” does not make that word “ said ” refer to the institute, but to the heirs of entail, because they were “ said ” as well as the institute. Then the word “ other,” which has been very ably reasoned on by the appellants’ counsel, must be thrown out as useless ; for the word “ other ” has occurred in other cases ; and it has not been held a clear designation on the part of the entailer meaning to make a reference to the institute.

Now, this being the law to be gathered from the

decisions, we are to apply that law to the present case; and as I am moving your Lordships to affirm this judgment, I should not have troubled you at so much length, had I heard the respondent's counsel. It is not denied that in all the dispositive parts of the deed Patrick Murray is referred to as the institute, nor is it denied that he is well prohibited by the prohibitory clause, nor that he is well forfeited by the resolute clause; but it is denied that he is struck at by the irritant clause; and the question is, whether, consistently with the principles I have just referred to, he is struck at by that clause? It is said that, within the four corners of that clause, he is fettered by reference. The words of the resolute clause are these: "With and under these irritances following, as it is hereby expressly provided and declared, that if the said Patrick Murray, or any other of the heirs of taillie above specified, shall contravene any of the conditions, and so on, he shall forfeit, and so on." That it is admitted is sufficient to forfeit heirs; but then there follow these words in that which may be called the irritant clause, "and it is also." Now that is beyond something done before *ex vi termini*, that is, going forward and adding another clause to the clause already expressed, — "and it is also hereby expressly provided and declared." Then comes a complete clause, not a member or part of a clause, but a complete irritant clause, which proceeds, after having put what acts being done shall be in contravention,—"that all the debts and deeds of the said heirs of taillie, or either of them, contracted, made, or granted, as well before as after their succession to the

LORD  
ELIBANK  
and others  
v.  
MURRAY.

19th Mar. 1835.

LORD  
ELIBANK  
and others  
v.  
MURRAY.  
19th Mar. 1835.

“ aforesaid lands and estates, in contravention of the  
 “ said taillie, and provisions, conditions, restrictions, and  
 “ limitations therein contained, and all adjudications, or  
 “ other legal executions or diligences, that shall happen  
 “ to be obtained or used against the fee and property of  
 “ the said lands and estates, or any part thereof upon  
 “ the same, shall be void and null, with all that may or  
 “ shall follow thereon.” And then comes a special  
 clause, which contains both forfeiture and irritancy:  
 “ But also the heirs of taillie respectively, upon whose  
 “ debts and deeds such adjudications shall have pro-  
 “ ceeded, shall, ipso facto, forfeit their right and title to  
 “ the said lands and estates, and the same shall devolve  
 “ to the next heir of taillie in like manner as if the con-  
 “ travener were naturally dead, and that freed and dis-  
 “ burdened of the said debts and deeds, and adjudica-  
 “ tions, and other diligences deduced thereon.” Now,  
 my Lords, I am clearly of opinion, that we should  
 shake the cases which have been decided on the prin-  
 ciple to which I have adverted in all their fair  
 reasonable meaning, and depart from the rule sup-  
 ported by those cases, if we found this was any thing  
 like a specific fettering of the institute or fiar, for the  
 words are “ the said heirs of taillie.” “ Said ” refers  
 to the heirs of taillie who have been before men-  
 tioned ; and as the first part of this clause only says,  
 “ that all the debts and deeds of the said heirs of taillie,  
 “ or either of them, contracted,” — “ in contravention  
 “ of this present taillie, and all adjudications upon  
 “ the same shall be null and void, with all that  
 “ may follow thereon,” that is not sufficient, as is



decided by cases, to comprehend or to irritate any thing done by the institute. Then it is said, “ But “ also the heirs of taillie respectively, upon whose debts “ or deeds such adjudications shall have proceeded, “ shall ipso facto forfeit their right and title to the said “ lands and estates, and the same shall devolve to the “ next heirs of taillie.” There is not a word here about the institute; it is an absolute statement of what is not to be done by the heirs of taillie; and to hold that as sufficient to comprehend the institute would be contrary to all the cases. I must observe on these cases, that the case of Duntreath is attempted to be differed from the present by a statement not to be gathered from the reports in the books, but which is found by resorting to the papers themselves. It is said that the Duntreath case contained a reference to the institute, and that he was stated to be the institute. I do not see, even if we admit that to be a correct statement of the case, how the decision can have gone upon it; I do not see how it is possible that any reference which could have been made in any part of the deed to Archibald Campbell, as the institute, could in the slightest degree have affected the decision of that case, which was this,—that though a man is stated to be institute, and though dealt with as such, though there is a disposition made to him in that capacity, yet if in the forfeiting and irritating clauses he is not plainly and distinctly referred to, the entail is good for nothing, for he is not touched; but the Duntreath case laid down the broad principle which I read from the very order of the House itself, that no implication can take place at all,—that it is not to be by implication,

LORD  
ELIBANK  
and others  
v.  
MURRAY.

19th Mar. 1835.

LORD  
ELIBANK  
and others  
v.  
MURRAY.

19th Mar. 1835.

but by nomination and direct reference to the individual. The only difference between that case and the present is this, that whereas there the institute was not named or referred to in any one of the three clauses, here he is named in two out of three, but not in the third. But the irritant clause is as necessary as the resolute or the prohibitory, and if it is necessary that you should have irritancy as well as forfeiture and prohibition, it will at once abolish that fundamental rule of the Scotch law of entail, — if you decide that there was any difference in principle between a case where he was named in not one, and a case where he is named in two and not in the third, it will be said that the House of Lords has decided that the irritant clause may be full of holes, and yet that will not signify; and that not only in the case of the institute and heir of entail, (the one now before your Lordships,) but in all cases where the question was as to the acts of the substitute, if you have a perfect prohibitory clause, and a perfect resolute clause, it does not signify whether the irritant is good or not. I now come to the case immediately before the Duntreath case, that is, the Fin-drassie case. The entailer expressed his intention “to  
“ provide for the upholding of his family, with and under  
“ the provisions, faculties, limitations, restrictions, and  
“ irritancies after specified, in favour of the heirs male  
“ of his own body, and heirs taillie, and provisions un-  
“ der written.” There he refers distinctly to the heirs of taillie who are mentioned; and he says, these clauses shall bind “the heirs of taillie above mentioned,” and in another place, “the haill persons and several branches

“ hereby called to the succession,” a word which does not occur here; yet this was held, as far as regarded the institute, to be an absolutely void prohibition, for that he was not referred to under any of those designations. There is a remarkable circumstance about this, to which I pointed the attention of the learned counsel at the bar; it illustrates the argument, and throws light upon the technical foundation of the words “ heir of taillie,” in a certain use of them. “ Heirs of taillie,” it appears, had been allowed by all parties, without any challenge whatever, to be a sufficient designation of the institute for certain purposes, and under those words he had taken the personal property of the author of the entail. I believe no one ever supposed that that was not quite sufficient to clothe him as heir of entail, with a view to giving him the rest of the property; but where the property under the entail was in question, it was found perfectly ineffectual. I do not say that has the force of a decision of the Court; it has only the force of the consent of the parties, to the fact of there being no difficulty in letting him in to take the personal estate under that expression, which they did not consider sufficient to fetter him. My Lords, I shall, last of all, make an observation on the case much argued by the appellants’ counsel, namely, the Dougalston case. There is not a pretence, there is not what Lord Thurlow used to call even a probable argument, for their calling in aid that case; it is remarkable for its unlikeness. There is no getting over this, that Mr. Henry Glassford, the fiar, was named in the irritant clause. They had chosen to make one joint

LORD  
ELIBANK  
and others

v.  
MURRAY.

19th Mar. 1835.

LORD  
ELIBANK  
and others  
v.  
MURRAY.  
—  
19th Mar. 1835.

clause of the irritant and resolute clause; and as I stated in the course of the argument, the second branch of that clause, beginning with the words “but also,” appears nonsense, unless you take it in connection with the other. The clause in the Dougalston case says, in case the said Henry Glassford does so and so, or in case any of the heirs of entail do so and so, then such acts and deeds shall be void, and he himself shall be forfeited. I do not say that the words are “he himself,” but they are quite tantamount to it. The words are, “each and every heir or person so contravening”—(including Henry Glassford, by plain reference,)—“shall forfeit and lose all right therein.” That is nonsense, unless you take in those words to which the words “so contravening” apply. The appellants’ counsel ingeniously attempted to show, that in this case there is, first, a complete resolute clause, and next, a complete irritant clause; but then, it does not affect this institute, for it does not say the heir of entail or person so contravening. The present case would have been like the Dougalston case, had it been thus: If the said Patrick Murray, or any of the said heirs of taillie, shall contravene so and so, not only such person or heir so contravening shall forfeit, but also the deeds of such and every such person or heir shall be void. If that had been so, it would have been like the Dougalston case; and if you refer to the Dougalston case to show that such would have been a sufficient designation of the institute, the short answer is, that he is referred to by the words which are employed. I by no means intend to say, that the word “person,” if it had occurred in the separate clause, might not have referred

to him, had it been said, "if the said heirs or other persons  
 " do so and so, their acts shall be void." I am not prepared to say that would not have been sufficient; for it is needless to repeat, that the word "person" is totally different in its signification from the words "heir of entail," which have a technical meaning; whereas the word "person" *may* comprehend institute as well as substitute or heir. In the Findrassie case the words, "the haill persons and several branches called to the succession," were not held to comprehend the institute; but I state this to show that the Dougalston case does not go so much upon that as upon the other foundation, that including the name of Henry Glassford, the institute, was part and parcel of the clause. Upon these grounds, I have no doubt that the Court below have rightly decided, and that your Lordships ought to affirm their decision. I can by no means approve of bringing cases here with any trifling novelty that may occur; we might then be deciding the Duntreath case once a week. I shall move your Lordships that this interlocutor be affirmed, with costs not exceeding 100*l*.

LORD  
 ELIBANK  
 and others  
 v.  
 MURRAY.

19th Mar. 1835.

The following judgment was pronounced in the appeal for Lord Elibank and his commissioners :

It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, " That the said petition  
 " and appeal be, and is hereby dismissed this House, and that  
 " the interlocutor therein complained of, be, and the same is  
 " hereby affirmed: And it is further ordered, That the  
 " appellants do pay or cause to be paid to the said respondent the sum of 100*l*. for his costs in respect of the said  
 " appeal."

LORD  
ELIBANK  
and others

v.

MURRAY.

—  
19th Mar. 1835.

And in the appeal for the purchasers (to which no answers were lodged for the respondent) :

It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, “ That the said petition  
“ and appeal be, and is hereby dismissed this House, and  
“ that the said interlocutor therein complained of, be, and  
“ the same is hereby affirmed.”

ALEXANDER MUNDELL, SPOTTISWOODE and ROBERT-  
SON—RICHARDSON and CONNELL,—Solicitors.

[31st March 1835.]

**WILLIAM MOREHEAD, Appellant.**—*Lushington.*

**The Rev. Dr. ROBERT MOREHEAD, and others, Respondents.**—*Sir John Campbell — S. A. Murray.*

*Entail.*—An entailer in his deed of entail, by a clause immediately following the destination, declared that the burthens, reservations, conditions, provisions, restrictions, limitations, and clauses irritant therein-after expressed should be binding on the institute as well as the substitutes; and the prohibitory clauses against selling, burthening, or altering the order of succession were directed against the institute as well as the substitutes; but certain other prohibitory clauses and the whole of the irritant and resolute clauses were directed against the “heirs of tailzie” only, without mentioning the institute. Held (reversing the decision of the Court of Session) that the entail was ineffectual to prevent the institute from selling the lands and disposing of the price at pleasure.

**I**N the year 1786, William Morehead, Esq., of Herbertshire, (father of the appellant,) executed a deed of entail of the lands and barony of Herbertshire in favour of the appellant (the institute), and a certain series of heirs. Immediately after the destination to the institute and whole heirs of entail, and immediately preceding the various prohibitory, irritant, and resolute clauses, there was a clause in these terms: — “But  
“ always with and under the express burdens, reservations, conditions, provisions, restrictions, limitations,

1st Division.  
Lord Fullerton.

**MOREHEAD** “ and clauses irritant after expressed, which are all  
 v.  
**MOREHEAD** “ hereby appointed to be inserted in the resignations,  
 and others. “ charters, and infeftments to follow hereon, and de-  
 31st Mar. 1835. “ clared to be binding, not only upon the said William  
 “ Morehead, my eldest son, and the heirs male of his  
 “ body, and the other heirs substitute to them by this  
 “ present tailzie, but also upon my heirs whatsoever, in  
 “ case the succession of my said estate shall happen to  
 “ devolve upon them, failing the heirs of tailzie above  
 “ mentioned.”

The deed of entail then contained prohibitions against selling, burthening, and altering the order of succession, which were made expressly applicable to the institute by name and “ the other heirs of tailzie.” It contained also certain other prohibitions directed only against “ the heirs of tailzie above mentioned.” The irritant and resolute clauses were in like manner directed only against the “ said heirs of tailzie above mentioned.”

The appellant succeeded to the lands, and made up titles under the entail; and in the month of June 1832 he entered into a minute of sale with his brother, the respondent, by which the appellant, on the one hand, sold to the respondent his estate of Herbertshire, and, on the other hand, the respondent became bound to pay to the appellant the price of 40,000*l.* sterling, by certain instalments, of which the first instalment, being the sum of 2,000*l.*, became due at Lammas 1832.

In order to ascertain whether the appellant had power to sell the estate, the respondent, instead of making payment of the first instalment at the stipulated term, presented a bill of suspension of a threatened charge,



alleging that the appellant, from the peculiar nature of his title, was not in a condition to grant a valid and sufficient disposition of the estate of Herbertshire, either to the respondent or to any other purchaser. It was stated, in substance, that the appellant held the estate of Herbertshire under a settlement of strict entail, executed by his father in the year 1786, and that by that entail the appellant was effectually restrained from altering the order of succession, from contracting debt, and, above all, from selling the estate.

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

The bill of suspension was passed, and the appellant instituted an action of declarator, directed against all the substitute heirs called to the succession by the deed of entail, and concluding that it should be found that the appellant had right to sell the lands.

These two actions were afterwards conjoined, and the Lord Ordinary (Fullerton) reported them on cases to the First Division of the Court, and issued the following note:—

“ The Lord Ordinary has pronounced the above  
“ order, as the course best calculated for expediting the  
“ decision of the cause. But, having considered the  
“ cases for the parties, he may be permitted to express  
“ his opinion, that the pursuer and respondent is en-  
“ titled to judgment in his favour.

“ In the first place, it is undeniable that the sub-  
“ stantive and express irritant and resolute clauses of  
“ the entail are limited to the heirs of tailzie, and do not  
“ affect the institute; and therefore, even if the general  
“ clause founded on by the defenders clearly expressed  
“ an intention to control and extend against the  
“ institute the specific provisions and restrictions, I

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

“ think that it would be difficult, consistently with the  
“ rules uniformly adopted in this branch of law, to  
“ give effect to such expression of intention. I enter-  
“ tain great doubt, indeed, whether an entailer could,  
“ by a mere general prospective declaration of intention,  
“ render binding upon the institute a clause which he  
“ afterwards expressed in terms clearly, and even  
“ technically, excluding the institute.

“ But, secondly, the case of the defenders and sus-  
“ pender here is much weaker than that just supposed ;  
“ the general clause in question, in so far as it can be  
“ construed as extending the effect of the specific pro-  
“ visions, clearly does not apply to the institute, but to  
“ the heirs whatsoever. The declaration, that resig-  
“ nation is ‘ made under the burdens and conditions  
“ ‘ after expressed,’ &c., ‘ which are hereby appointed  
“ ‘ to be inserted in the resignations,’ &c., and declared  
“ to be ‘ binding, not only upon the said William  
“ ‘ Morehead, my eldest son, and the heirs of tailzie,’  
“ but on the heirs whatsoever,—cannot, according to  
“ fair construction, and still less according to the strict  
“ construction, applicable to entails, receive any inter-  
“ pretation, but that the provisions, restrictions, &c.  
“ ‘ after expressed ’ are to be binding on William More-  
“ head, and the heirs of tailzie respectively, according  
“ to the terms in which they are expressed, namely,  
“ those including William Morehead, to be binding  
“ against him, and those directed only against the heirs  
“ of tailzie, to be binding only on those heirs of tailzie.  
“ The terms of the declaration, even in the most  
“ favourable point of view for the defenders, could do  
“ no more than raise a presumption that the entailer

“ possibly considered the term ‘ heirs of tailzie ’ to  
 “ include the institute,—a presumption which is con-  
 “ fessedly insufficient to supply the defects of the  
 “ irritant and resolute clauses.

MOREHEAD

u.  
 MOREHEAD  
 and others.

31st Mar. 1835.

“ It is hardly necessary to add, that in regard to the  
 “ second entail, framed in compliance with the statute,  
 “ the same principle must apply, as the statute did no  
 “ more than merely provide for the secure operation,  
 “ against the institute, of all the provisions and re-  
 “ strictions to which he was subjected by the conditions  
 “ and restrictions of the original entail.”

The Court, on the 2d July 1833, pronounced the following interlocutor:—“ The Lords having advised  
 “ this cause, and heard counsel for the parties in the  
 “ process of declarator, sustain the defences, assoilzie  
 “ the defenders, and decern; and in the suspension  
 “ suspend the charge simpliciter, and decern.”<sup>1</sup>

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<sup>1</sup> 11 S., D., & B., 863. The following notes of the opinions delivered in the Court of Session were laid before the House:—

*Lord Balgray.*—“ The parties here are highly respectable, and the  
 “ action, I feel assured, would not have been brought but for some proper  
 “ and important object. I wish that we could come to the same result  
 “ here as in the last case, which we have just now decided, (case of  
 “ *Elibank v. Murray.*) But, my Lords, we must take the case as it  
 “ stands, and try it upon its own peculiar merits. By the Act 1685,  
 “ every entailer may express his own deed of entail in any way. There  
 “ are no technical clauses which are required to be taken in a certain order,  
 “ or any express form of words in which the clauses are to be expressed.  
 “ The entailer may write his own entail, and use his own language. We  
 “ must look to the intention. It is necessary to consider what is clear in  
 “ point of intention; and for that purpose we must take the whole deed  
 “ together. It may be read as a single sentence. The entailer, if I may say  
 “ so, may begin at the end, and his object will be attained, if he only com-  
 “ ply with the provisions of the act, by inserting clauses to the effect which  
 “ the act authorizes and requires, without regard to any set form of words.  
 “ The whole dubiety in the case rests upon this, that in some clauses the  
 “ institute is bound, and that in others the institute is not bound. But

## CASES DECIDED IN

... the above interlocutor William Morehead  
...

*Respondent.*—The irritant and resolute clauses, of  
... the proper operation is to make the prohibitions  
... do not reach or affect the appellant, who is the  
... of entail. This proposition is undeniable, and  
... been so enounced by the Lord Ordinary; neither is  
... possible to question it either with reference to ac-  
... knowledged rules of legal construction, or to the appli-  
... cation which these rules have received through a long  
... series and a great variety of cases. Entails are strictissimi

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... then in this dubiety I refer to the clause which follows immediately after  
... the destination. It is a general and comprehensive clause, in which the  
... entailer declares, that the whole 'burdens, reservations, conditions,  
... restrictions, limitations, and clauses irritant after expressed, which are  
... all hereby appointed to be inserted in the resignations, charters, and  
... indentments to follow hereupon,' shall be 'binding, not only upon the said  
... William Morehead, my eldest son, and the heirs male of his body, and  
... the other heirs substitute to them by this present tailzie, but also upon  
... my heirs whatsoever, in case the succession of my said estate shall happen  
... to devolve upon them, failing the heirs of tailzie above mentioned.' Now,  
... I think that this is a general declaration affecting all the parties called  
... to the succession, the institute as well as the substitutes, and that the  
... declaration is put in at the proper place of the deed. The only difficulty  
... in the case lies here, that in the different prohibitory clauses some of the  
... prohibitions are made effectual against the institute, and others are not.  
... But I am afraid that this will not do; that it will not entitle us to re-  
... use effect to the entail,—we are bound to look to the entailer's inten-  
... tion—we must give effect to his words in the way which he has used  
... them. And as the provisions of the entail are expressed in broad and  
... general terms, and are comprehensive enough to embrace all the parties  
... called to the succession, I am, on this general ground, and without  
... entering into particulars, for supporting the entail."

*Procurator.* "The declaration of the entailer is quite general in its  
... It clearly applies to all the different parties called to the suc-  
... The entail must therefore stand."

*Respondent.* "I am of the same opinion."

*Respondent.* "I agree. We suspend the letters and sustain the

juris, and are subject to the most rigorous construction ; and the law will not, as in the interpretation of other and more favoured instruments, lend itself, by straining construction, to aid the views of an entailer : on the contrary, to make his intention effectual, he must express himself in words so clear and explicit, so unequivocal in the meaning and import, as to leave no choice, and to control the law, and force the reception of that which, while it is admitted to be within the power of an entailer, is odious to the law, as being contrary to the natural rights and reasonable enjoyment of property, and adverse to the best and most obvious interests of society. In all cases where the question, how far there was a valid imposition of fetters, has arisen, the fullest effect has been given to these principles of construction. In the case of Duntreath, this House overruled the decision pronounced by the Court of Session ; and declared that the appellant being fiar or disponee, and not an heir of tailzie, ought not by implication from other parts of the entail to be construed to be within the prohibitory, irritant, and resolute clauses, laid only upon heirs of tailzie ; and effect has been given to it in many subsequent cases, turning precisely upon the question whether a prohibition directed against heirs of entail simply was to be extended so as to comprehend the institute ; and the answer ever since has been, that, whatever the entailer may have intended, he had not by unequivocal and controlling expressions effected his purpose, the institute not being an heir, and the heirs being the persons, so far as regarded the terms used, who alone were fettered.

It is impossible to contend that the general clause, on which the respondents found, can extend the prohibitory,

MOREHEAD

v.

MOREHEAD  
and others.

31st Mar. 1835.

MOREHEAD  
v.  
MOREHEAD  
and others.

—  
31st Mar. 1835.

irritant, and resolute clauses against the institute, further than they are expressly carried by these clauses themselves; because, in the first place, that general clause receives in any view full effect according to the acknowledged construction of such instruments, applicando singula singulis, and holding obligatory against the institute, heirs of entail, and heirs whatsoever respectively, the various conditions which are by the subsequent clauses imposed separately upon these different classes; and secondly, if that clause was meant to impose fetters at all, it was only meant so to operate against the heirs whatsoever of the entailer; and at all events, as regarded the institute, amounted to nothing but an intimation of what the entailer understood himself to have effected; which intimation, if erroneous in itself, would not alter the effect of the prohibitory, irritant, and resolute clauses; nor carry them further than was warranted by the just and legal construction of the terms in which they were expressed.

In no view of the case can the general clause referred to be considered effectual to make the fetters of entail attach to the appellant as institute; for that clause refers to the irritant clause only, and not to the resolute clause, which last, equally with the irritant clause, is essential to the validity of the entail. Unless the three clauses concur there is no effectual entail, and a want or imperfection in the resolute clause, as was found in the case of *Tillicoultry*, is just as fatal to the validity of the entail as the want of an irritant clause or defect in the prohibitions.<sup>1</sup>

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<sup>1</sup> *Appellant's Authorities.* — Erskine, 14 Feb. 1758; Edmonstone of Duntreath, 24 Nov. 1769, (Mor. 4409); Gordon and Lindsay, 8 July

*Respondents.*—No verba solemnia are requisite in entails, nor is any given arrangement of the clauses essential; it is enough that there are sufficient prohibitions duly fortified by irritant and resolute clauses. It is admitted by the appellant that these clauses in this deed are sufficient in themselves, and affect the heirs of entail, and the only question raised is, whether they apply to the institute. But immediately before introducing these clauses, the entailer makes an express provision, declaring each and all of them to be binding, not only upon the said William Morehead (the institute), but also on other parties; no room therefore is left to argue as to any ulterior intention in framing this general clause. Apparently the entailer had designed to extend the fetters to his heirs whatsoever; but whatever else he had intended, the act of applying the whole prohibitory, irritant, and resolute clauses to the institute is what he has expressly performed, and this entail is, therefore, effectual against the appellant, who is the institute. The present is distinguishable from the Duntreath and other similar cases relied upon by the appellant, in which the institute was held not to be bound, (notwithstanding the plainest implied intention to the contrary,) in this respect, that in the present there is a great deal

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

---

1776, (Mor. 15,462); *Menzies v. Menzies*, 25 June 1785, (Mor. 15,436); *Sandford on Entails*, 141—143; *Miller v. Cathcart*, 12 Feb. 1799, (Mor. 15,471); *Steel v. Steel*, 12 May 1814, affirmed in House of Lords 24 June 1817, (F. C. and Dow's Reports, vol. v. p. 62); and see preceding case of *Elibank v. Murray*; *Dick v. Drysdale*, 14 Jan. 1812, (F. C.); *Bruce v. Bruce*, 15 Jan. 1799, (Mor. 15,539); *Barclay v. Adams*, 18 May 1821, (1 Shaw's Appeal Cases, p. 24); *Hope Vere v. Hope*, 12 Feb. 1828, (6 S. & D.); *Sandford on Entails*, 141.

MOREHEAD  
 v.  
 MOREHEAD  
 and others.  
 —  
 31st Mar. 1835.

more than mere implication of an intention to bind the institute. In addition to such implication as appearing from the other clauses in the deed, there is the following clause, not merely directly implying, but expressing in very plain terms an intention to bind the institute, and declaring him to be bound accordingly :—“ But always  
 “ with and under the express burdens, reservations,  
 “ conditions, provisions, restrictions, limitations, and  
 “ clauses irritant after expressed, which are all hereby  
 “ appointed to be inserted in the resignations, charters,  
 “ and infeftments to follow hereon, and declared to be  
 “ binding, not only upon the said William Morehead,  
 “ my eldest son, and the heirs male of his body, and  
 “ the other heirs substitute to them by this present  
 “ tailzie, but also upon my heirs whatsoever, in case  
 “ the succession of my said estate shall happen to  
 “ devolve upon them, failing the heirs of tailzie above  
 “ mentioned.”

The appellant contends for a rule of construction which has been otherwise rejected as applicable to deeds of entail, viz. to construe according to implied intention rather than according to the words actually made use of; because, whatever was the intention, the words of the clause certainly declare the restrictions, &c. to be binding “ upon the said William Morehead,” as well as upon the other parties mentioned. With respect to intention it is plain that it was one of the express objects of this clause to bind the institute. The framer of the deed probably knew that in going through the details of the different prohibitory, irritant, and resolute clauses there might be occasional oversights as to the institute, (which practice has shown so often to



occur,) and that very nice questions had often arisen as to whether the institute was sufficiently included in the fetters or not; and therefore it must have been for the express purpose of avoiding those questions that this previous declaration was introduced; and having made that general declaration, the entailer was less anxious as to the precision with which the after clauses were in that respect framed.

The expressions “not only upon the said William Morehead, &c., but also upon my heirs whatsoever,” must be read in the same way as if they had stood—  
“both upon the said William Morehead, &c., and also  
“upon my heirs whatsoever.”

It cannot be successfully contended that there is an absolute impossibility, from mere priority of place, to frame a preliminary declaration in such a form as to control or extend the subsequent irritant and resolute clauses in the manner contended for. The question might indeed be different, if these subsequent clauses contained any positive provision directly in the face of such preliminary declaration; and where there was no other means of getting rid of the difficulty, the maxim *posteriora derogant prioribus* might certainly apply. But, in the present case, the subsequent clauses contain no positive provision in the face of the previous preliminary declaration; there is nothing irreconcilable betwixt them. At the very most, the strict legal interpretation of the terms made use of in framing the subsequent clauses is not of itself sufficient to include all the parties to whom that previous preliminary declaration had declared they should be applicable. Neither could a preliminary declaration of this description ever be

MOREHEAD

v.

MOREHEAD

and others.

31st Mar. 1835.

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

expected to contain an express recognition of the supposed defect. Such a declaration is evidently not framed with a view to any certain and known defect, but ob majorem cautelam, in case of any accidental and unforeseen omission or oversight in the details of the subsequent clauses, such as has actually occurred. If there had been no such accidental omission or oversight, then the preliminary declaration would not have been necessary to have been brought into play at all; but when there turns out to have been such an oversight, it is just one of the cases contemplated for applying the declaration; and, as formerly noticed, there being no *verba solemnia* requisite to be made use of, if the meaning of the declaration is sufficiently plain, effect must necessarily be given to it.

LORD BROUGHAM. — This case comes before your Lordships by appeal from the First Division of the Court of Session, sustaining the defences and assoilzing the defender in an action of declarator brought by the appellant and pursuer, and suspending the charge simpliciter in the suspension brought by the respondents. The action of declarator was brought to have the rights of Mr. Morehead the appellant declared to sell or alienate the estates comprehended in a deed of entail of the estate of Herbertshire, executed by his father in November 1786, and in which he was made institute or disponee. The suspension was brought by the respondents, purchasers of those estates, on the ground that the appellant, in consequence of the entail, could not make a good title to them. The two actions were conjoined, and indeed they wholly turn upon the same question, viz. whether or not the in-

stitute is validly fettered by the restrictions of the Herbertshire entail? To this question I am now to address myself; and I do so with the more solicitude that I differ with the Court below, having arrived at a conclusion opposite to that which those very learned judges unanimously came to. It is a great comfort to reflect that I have spared no pains in obtaining whatever light I could upon the subject. I know that I have very diligently examined it, and that the opinion which I have formed is consistent with all my former impressions upon the general question. I have also the satisfaction of finding that the Lord Ordinary took the same view of it; and I may add, that I have the less reluctance in recommending a reversal of the judgment, because I really entertain no doubt upon the point. It is needless to observe how extremely important all cases of this description are; they constitute the law of Scotch entail, much more to be derived from the course of judicial decision than from the statute 1686, in which we shall vainly look for the canons that are now held to govern this important subject. No examination of that act, nor any commentary upon its provisions, would ever enable a person to discover what the rules are that regulate the dispositions of real estate, and fix the limits within which and the modes by which perpetuities may be created in its enjoyment and descent; nor can we survey without some satisfaction the extraordinary uniformity which marks this long course of decisions. There is no branch of the Scotch law more regular, fixed, and systematic,—none in laying down which the Courts have less wavered in their determinations. The law itself may be an unfortunate one,—the Courts may have originally admitted

MOREHEAD

v.

MOREHEAD  
and others.

31st Mar. 1835.

MOREHEAD  
v.  
MOREHEAD  
and others.

—  
31st Mar. 1835.

great refinements in expounding it,—in some principles declared by them we may find caprice,—for others we may be at a loss to discover the reason; but at least, the greatest of all errors, and the worst of all mischiefs, the *jus vagum et incognitum* is not to be charged upon the system; for example, upon the subject of the disponent's freedom or subjection, which is the branch of the law of entail now before us, the whole current of authority is quite uniform, great as the variety of the circumstances has of necessity been, in which the different decisions have been pronounced. For nearly a century past you will only find a single instance in which that current has been turned aside, and then the deviation was but momentary—between 1769, when the Court, in the *Duntreath* case, departed from the strict rule, and 1771, when your Lordships restored it upon appeal. This uniformity and certainty afford us some satisfaction, in regarding a branch of our jurisprudence, not surely the most to be praised in other respects, and may be in some sort considered as of a redeeming quality to the evils of the Scotch entail system; at all events, it inculcates the expediency of maintaining the same uniformity and certainty with unabated severity, until the wisdom of the legislature shall see fit to interpose. I shall begin with attentively examining the provisions of the settlement in question; upon these, of course, the whole argument turns.

I. The entailer disposes to the appellant, William Morehead, and of course the institute; he then gives to William Morehead's heirs male of his body, and a variety of other substitutes, and lastly to his own heirs and assignees whatsoever, the eldest heir female taking

always without division. Then comes the usual general clause, which in many instruments of this kind closes the designation of heirs, and introduces the fetters or clauses of restriction, and which has, by constant decision and by all authority, been held to have no substantive effect whatever, but merely to be a connecting link between the one and the other part of the deed,—“always with  
 “ and under the express burdens, reservations, conditions,  
 “ provisions, limitations, and clauses irritant after ex-  
 “ pressed;” and if this clause had here stopped, no question could ever have been raised, for it would have had simply no effect at all in binding any of the formerly named persons with the fetters afterwards imposed, any more than if it had not occurred in the instrument. But it proceeds, “ which (provisions and clauses) are all  
 “ hereby appointed to be inserted in the resignations,  
 “ charters, and infestments to follow hereupon, and de-  
 “ clared ” (that is to say, I think, in all fairness of construction, “ and *are hereby* declared”) “ to be binding,  
 “ not only upon the said William Morehead, my eldest  
 “ son, and the heirs male of his body, and the other  
 “ heirs substitute to them by this present tailzie, but also  
 “ upon my heirs whatsoever in case the succession of my  
 “ said estate shall happen to devolve upon them, failing  
 “ the heirs of tailzie above mentioned.” Next follow the clauses themselves; and it is of the last importance to observe, that in some of these the institute is expressly named, and in others not at all, nor ever in any manner of way referred to. First of all there are six prohibitions, or rather directions of things to be done and to be avoided. 1. The taking of the name and arms is enjoined to the heirs of tailzie only, without any mention

MOREHEAD

v.

MOREHEAD  
and others.

31st Mar. 1835.

**MOREHEAD**  
**v.**  
**MOREHEAD**  
**and others.**  


---

**31st Mar. 1835.**

either of the institute or the heirs general. 2. The prohibition to alter the order of succession is laid on the institute and heirs of tailzie, “substitutes or successors above mentioned,” which might be contended to include heirs general, though of this I should have great doubt. 3. The prohibition to sell, dispone, wadset, or impignorate, is directed in like manner against the institute, heirs of tailzie, and successors. 4. The prohibition of suffering feu-duties and teinds to remain unpaid extends only to heirs of tailzie above mentioned. 5. The prohibition of suffering adjudication or eviction is also confined to heirs of tailzie. 6. The direction to possess on the title of the entail alone is confined to the same heirs of tailzie. Thus, then, as far as the present question goes, the institute is fettered by a prohibition to sell, burden, and alter the order of succession. Next follow the irritant and resolute clauses. The former makes void all acts in contravention of the prohibitions “done by the said heirs of tailzie above mentioned,” without any reference to the institute; and the latter declares, that “the person so contravening,” that is, the “above-mentioned heir of tailzie so contravening,” shall forfeit and amit his right. A declaration immediately follows, that the forfeiture incurred by “the heir in possession contravening” shall not be purgeable; and then follow certain exceptions, or rather enabling clauses, the two first of which only are material to our present purpose. By one of them “the whole heirs of tailzie above specified” are allowed to jointure as far as one third of the rent; by the other, the “said heirs of tailzie above mentioned” are allowed to give younger children portions not exceeding three years’ income. It is there-

fore quite clear, that if the fencing clauses stood alone, and were only connected with the dispositive clause, and the designation of heirs by the usual general words, “but always under the clauses here after written,” the institute would be free; for he is only under a simple prohibition, and his acts of contravention are not declared void, neither is his right declared forfeited in case he contravene. The nullities and the forfeiture are directed against the heirs of tailzie alone, and touch not the disponent. But the connecting or general clause, which closes the destination and introduces the restrictions, varies from the ordinary form of such clauses; and it is upon this variety alone that the judgment of the Court below has been rested, both by the respondent at your Lordships’ bar and by the learned judges who pronounced the decree. Let us examine it therefore narrowly; and, first, let us look at its purpose, that is, at whatever purpose it may have different from the common purpose of connecting the parts of the deed,—the purpose which all such clauses ordinarily have. The additional or special purpose here,—what may be called the extra purpose,—seems clearly to be, the comprehending under those clauses the heirs general, whom he had introduced at the close of the destinations. This is plain; because the structure of the sentence shows it, and because those heirs are not afterwards mentioned. The structure of the sentence is, “that the clauses shall be binding not only upon William Morehead and the other heirs of tailzie, but also upon the heirs whatsoever, should those heirs of tailzie fail.” It is not, that the clauses are declared binding, first upon the institute, and then on the nominatim sub-

MOREHEAD

v.

MOREHEAD  
and others.

31st Mar. 1835.

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

stitutes, and then on the heirs general, which would far more distinctly have indicated the intention of binding both institute, substitutes, and heirs general; but that the clauses are substantively declared to be binding on the heirs general; and their effect on the institute and substitutes is as it were referred to in passing—is assumed—is recited and not enacted—is mentioned narratively and not operatively. The entailor seems to assume that he had otherwise bound the institute, and is here binding the heirs general in the same way as he had elsewhere bound him. Now, it is admitted on all hands that a supposition of this kind goes for nothing; and that the maker of an instrument of this description does not bind any one, or effect any purpose whatever, by merely referring to something which is in itself ineffectual, and by giving us to understand that he supposed he had executed his intention. He must do as well as mean to do; he must perform what he intended. I have mentioned another reason for holding the general clause to be directed towards the heirs general: it is, that nowhere in the subsequent parts of the deed do we find them referred to. The institute and substitutes are struck at by some of the clauses, the substitutes alone by others, heirs general by none; nor can they be brought by construction within any of the expressions used, unless we give that extensive meaning to the word “successors,” in the second and third prohibitions, where alone it occurs,—a stretching of the sense which I consider as somewhat violent. That the object of the entailor was such as I have been stating, is further rendered probable by the circumstance, that heirs general were determined not to be struck at by the restrictive clauses



in Sir T. Kennedy's case, decided in 1760<sup>1</sup>,—a circumstance probably known to the framers of the present entail. On the whole, I have no doubt that the object of the general clause in this deed, I mean the object of the peculiar addition which is here made to the words ordinarily found in such clauses, is not to make the fetters bind the institute, but to fix them upon the heirs general; and this is the first position on which I rest my opinion. But this is by no means the only ground, nor the firmest foundation of it. I proceed to observe, that even if we take the clause as having a primary and a substantive application to the institute, William Morehead, it is not easy to give it a larger operation than the usual general and connecting clause, "with and under the restrictions following." If an entailer calls to the succession a series of heirs, after disposing to a given person, and if he then says, "with and under," &c., he may be said to direct that both the dispositive and the heirs before named should alike take under the restrictions that follow; yet we all know that no such sense is ever given to the clause. The institute is held to take under such restrictions as are directed afterwards against him, and the substitutes to take under the restraints levelled at them. This is clear and uncontested. Then, how much farther does a clause like the one now under construction carry the obligations? The mere collocation of the clause, viz., its coming immediately after the series of persons designated, and the manner in which it connects them with the ensuing parts of the deed, the fetters, is surely as strong to connect and to bind them all, institute and

MOREHEAD

v.

MOREHEAD  
and others.

31st Mar. 1835.

---

<sup>1</sup> Earl of March v. Sir T. Kennedy, 27 Feb. 1760, (Mor. 15,412.)

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

substitutes, as the merely specifying both the one and the other in the way here pursued. If I say "A., B., and C. shall take my estate in succession, but with the following restrictions," I may by those words fetter all the three, or I may not; but certainly I fetter them as effectually by those words merely, as if I added, what is truly a tautology or repetition after the word restrictions, "which I hereby declare to be binding upon the said A., B., and C." The clause means exactly the same thing without as it does with this addition; for the provision that A., B., and C. shall take under the restrictions, is exactly synonymous with the declaration that those restrictions shall be binding on A., B., and C. Apply this to the clause in question, and you will see that nothing is really added to the force of the first and usual portion of the clause by the addition which forms the only peculiarity of this case. William Morehead had been named before, just as specifically as he is in the addition to the clause, nay, more specifically, and consequently he was connected with the restrictions, just as much by the words "with and under the restrictions following," as he could be by the additional declaration, that these restrictions should bind him. But it is admitted on all hands, that the words "with and under these restrictions" would not have touched him at all. Then it follows, that a repetition of those words, in a somewhat different form, in the same clause cannot touch him. The second position, therefore, on which I rest my opinion is, that the special addition made to the usual connecting clause, even taking it to be a declaration substantively directed against the institute, and not by way of recital only, has no effect at all beyond what

the position and the structure of the usual clause has, and does not carry the operation of that clause further. But the reason why those general words have no binding effect in the common case deserves to be regarded, and it raises another and yet more conclusive argument in favour of the judgment which I am recommending to your Lordships. It is not because we reject the clause, but because we give it a flexible and equivocal construction, that it is inoperative. When A., B., and C. are designated as taking, and when it is added that they are to take, with and under the following restrictions, we hold that each is to take under the restrictions directed against him, and not that each is to take under all the restrictions; nor can any rule of construction be more natural, more reasonable, or more safe. For surely it is much more likely that when we come to the particulars, we should find the intention distinctly expressed than in the general introduction; it is much less likely to beget mistakes, if we go to the most special mention of the matter; and it is much more likely, that when a change is made in the manner of mentioning persons or things there should be a reason for this,—a meaning in this variation. The entailor says, let A., B., and C. take successively, but under the following restrictions, that B. and C. shall bear the name and arms; that A., B., and C. shall be forbidden to alter the order of succession; that A., B., and C. shall be forbidden to sell or burden; that B. and C. shall forfeit, if they do sell or burden; and that B. and C. shall commit void acts if they do sell or burden. Have we any right to suppose that A. was omitted in the first and two last of these provisions, and inserted in the second, third, and fifth, without any mean-

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

**MOREHEAD**  
v.  
**MOREHEAD**  
 and others.  
 —  
 31st Mar. 1835.

ing at all? Is it not a much more safe thing to suppose that three of the restrictions were intended to affect him with the others, and three to affect the others only? and this when there is no necessary contradiction between the particular and the general clauses. For the general clause is perfectly sensible and consistent with itself, if we read it so as to make it consistent with the special clauses; that is, if we suppose it only to mean, that all the three, A., B., and C., take under the restrictions to be afterwards imposed upon them severally. In this entail the general or connecting clause mentions the institute with the substitutes. In four of the six prohibitions and directions the substitutes alone are referred to; the institute is only joined with them in two; and in neither of the clauses, irritant and resolute, is the institute mentioned at all. It is unnecessary to inquire what might have been the effect of the general clause in question, had all the prohibitory, irritant, and resolute clauses been directed against the heirs of tailzie alone. The present case is widely different from that. In thus referring from the generality of the connecting clause to the particularity of the clauses which do really execute the intention, we are not only justified by the express reference which the connecting clause bears to those particular provisions, but by the general rules of construction; one of these is, that generals shall be construed with regard to particulars to which they refer: so we constantly take extensive words in a restricted sense by reference to specific enumerations which precede or follow. Another rule is, that where two references are made to the same subject matter, and the one is more flexible than the other, we construe both together, and

make the flexible expression bend to suit the more reluctant phrase. A third is (and it is of most immediate application here, and may indeed be held as having a sovereign virtue in dealing with the provisions of a Scotch tailzie,) that where there are two different parts of an instrument, and mention is made in them both of the same matter, we are rather to seek the intention of the maker in that part whose proper office it is to deal with that matter than in the other part, where it occurs incidentally, if not out of its proper place. The appropriate place for imposing the fetters is the fencing clauses; these fetters are foreign to the general or connecting clause: therefore, we naturally go to the fencing clauses in order to ascertain what is forbidden or enjoined, and to whom the prohibition or command is addressed; and we there find, that against the substitutes the whole prohibitions, irritancies, and forfeitures are pointed, but only two of the prohibitions against the institute. This, then, forms the third ground of my opinion; namely, that the general mention of William Morehead and the substitutes in the special declaration of the connecting clause, even supposing it to be operatively directed against them as well as against the heirs general, must be construed along with the specific frame of the restrictive clauses, and means only that William Morehead shall take under the restrictions which are thereafter to be directed against him, and the substitutes under the restrictions directed against them. It may be further observed on this entail, that it would be extremely difficult under the general clause to give the institute the benefit of the powers, so as to enable him either to jointure his wife or make provision for his younger children. Those powers are most

MOREHEAD

v.

MOREHEAD

and others.

31st Mar. 1835.

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

expressly given to the heirs of tailzie in terms. The general clause has not one word which refers to power directly, and only one which can be stretched so as to include a power, viz., “provisions,” which coming after the words “but always with and under,” in the company of such words as “burdens, reservations, conditions, restrictions, limitations, and clauses irritant,” must surely be taken to mean provisions of a restraining and not of an enabling nature. But even if we could suppose a power included under this term, it occurs in the ordinary part of the clause; and in that special part where the institute is named the declaration is, that he and the substitutes are to be bound and not enabled by what follows; therefore, were the institute under the fetters of the entail, he, the disponent, and principal object of bounty, would be tied up from giving any jointure and providing for any younger child. I know not that, after the reasons which I have given, it is worth while to add, that in no part of this deed can we find William Morehead spoken of as an heir of tailzie, or an heir, in the way not unusual in other entails; and which, nevertheless, has not been held of any avail, except to show that the maker of the deed laboured under a mistake as to what he had really effected. The entailer here never says,—“William Morehead and my other heirs of tailzie,” but “William Morehead and the heirs male of his body, and the other heirs substitute.” This only serves to show that circumstances are wanting here, which in other cases have been dwelt upon, though without success, as evincing the entailer’s meaning; whatever he meant goes for nothing, unless he validly executed his intention. I have already said, that it is

quite unnecessary for the present purpose to determine what would be the effect of a connecting clause like the one here inserted, if no mention were made of the institute in any of the restricting clauses. Some argument might be raised on the special mention of the institute; and it might perhaps be argued, that there could be nothing done applicando singula singulis. Upon the face of this argument, and upon the question whether it is reconcilable to the rule in the Duntreath case, I desire to be understood as giving no opinion either way; but I can have no doubt whatever, that a general clause might be so framed as to connect the institute with the fetters, even if in some of the fencing clauses he was named, and in some left out. Thus, if the entailer were to say that he desires it to be understood, that wherever he has bound the substitute he means the institute to be equally bound; or, if he were, by a very slight variation of the clause now under consideration, to say that he declares each of the clauses which follow to be binding upon the institute as well as upon the substitutes, there can be no doubt that this would extend the fetters, and would not be within the rule in the Duntreath case; for it would not be bringing in the disponent "by implication" "from other parts of the deed, within the clauses,"—it would not be implication, but direct and inevitable construction; and it could hardly be said to be inferring any thing from other parts of the deed, inasmuch as a clause of the frame I have supposed would in truth be a part of the fencing clauses, from its structure and import. But nothing can be less like such a clause than the one we have here to deal with; and yet I am convinced that the Court below assumed this clause to be exactly like the one I have been supposing.

MOREHEAD

v.

MOREHEAD  
and others.

31st Mar. 1835.

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

II. A reference to the authorities confirms the view which I have taken of this case, while I do not think it possible to maintain the decision of the Court below, if those former resolutions are law. In the Findrassie case, *Leslie v. Leslie*<sup>1</sup>, there were some strong circumstances to bring the institute within the fetters as a preliminary declaration, before the destination, that the object of the deed was to call the heirs of the maker's body and heirs of tailzie, with and upon the provisions, faculties, restrictions, and irritancies "after specified," the eldest son being the institute; and the institute had in fact obtained, without dispute, the possession of the personal estate under a gift, in which he was only described as heir of tailzie; yet no mention of him occurring in the restrictive clauses, he was held unfettered. *Erskine v. Balfour Hay* (the Randieston case)<sup>2</sup> is not marked by any peculiarity, and only merits notice as wholly irreconcilable with the decision in the Court below on the Duntreath case, and as showing that your Lordships, under the advice of the illustrious judge who then advised you in judicial matters, laid down no new rule, and stretched no old one, when you reversed that decree. Indeed, the Findrassie case was stronger, and the Randieston case as strong as the Duntreath.<sup>3</sup> The Duntreath case, however, deserves some further consideration, with a view to the present. I conceive that it is calculated to give a very useful light for guiding us here; and that circumstances fully stronger

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<sup>1</sup> 5th Dec. 1752. Elchies, No. 49, voce Tailzie.

<sup>2</sup> 14th Feb. 1758. Mor. 4406.

<sup>3</sup> *Edmonstone v. Edmonstone*, 24th Nov. 1769. Mor. 4409.



for binding the institute were to be found in that celebrated question than exist in the one before us. A. Edmonstone, the disponent, was the entailer's eldest son; and the entail being in pursuance of a marriage settlement made in 1716 (as we learn from the appellant's case in your Lordships volume for 1771), he was properly heir of provision as well as institute. All the resolute clauses were directed against heirs of tailzie only, except two; that Archibald Edmonstone, and the other heirs of entail above named, should perform the obligations by which the entailer was bound; and that any of the heirs of tailzie and provision above mentioned (which might seem to include the institute) were to forfeit, if they did any act by which the estate might be evicted. But what is very material, and must be allowed to be at the least as strong as the special direction in the connecting clause here, the obligation to infest Archibald Edmonstone the disponent, and other heirs of tailzie, is to do so under the prohibitory, irritant, and resolute clauses of the deed; and the procuratory of resignation to the same disponent by name, and the other heirs of tailzie, is also with and under the conditions, prohibitory, irritant, and resolute clauses; and last of all, a portion of 40,000 merks is provided to the entailer's younger children, to be paid by the heirs of tailzie only. Independent of the construction treating the institute as an heir of tailzie, indicated by the use of the word other (which we have not in the present case), there are here intimations of the intention to fetter him, and even acts done for that purpose, which do not occur in the case at bar. I mention the case of Wellwood, for the purpose of noting the great inaccuracy that has crept into the report, as given in the

MOREHEAD

v.

MOREHEAD  
and others.

31st Mar. 1835

**MOREHEAD**  
**v.**  
**MOREHEAD**  
**and others.**  
 —  
 31st Mar. 1835.

Faculty Collection, the second time that entail came in question, viz., *Wellwood v. Preston*, 31st May 1797.<sup>1</sup> The abstract by the learned reporter states, that the clauses were directed against the institute and the other heirs of entail, and it is so copied into the Dictionary and other books. Not only is it quite impossible that any such entail could have been held inoperative against the institute, but on referring to the former decision on the same instrument, *Wellwood v. Wellwood*, in February 1791<sup>2</sup>, we find that there was no reference to the institute in the restricting clauses. It is unnecessary to mention the *Elibank* case<sup>3</sup>, so recently before your Lordships, and decided in the Court below on the same day<sup>4</sup> with the present. But that of *Baldastard*,—*Steel v. Steel*, which was decided by Lord Eldon<sup>5</sup> after much consideration, and which I recollect excited great attention both at the bar and from your Lordships, was a strong decision on the principles which govern this branch of the law. The connecting clause was very full,—“under  
 “ conditions and irritant and resolute clauses, in all  
 “ time coming, to be observed by all and every heirs  
 “ and substitutes above named.” Every person and heir male and female who should succeed was to take the name and arms; the said heirs and members of tailzie were to possess only under this title; none of the said heirs were to alter the order of succession, or lease for more than nineteen years; the said heirs and members of tailzie were forbidden to sell; the whole heirs and members of tailzie aforesaid were to perform all that was

<sup>1</sup> Mor. 15,466.

<sup>2</sup> Mor. 15,463.

<sup>3</sup> Ante, p. 1.

<sup>4</sup> 12 May 1814, (F. C.)

<sup>5</sup> 27 June 1817. 5 Dow, 73.

directed, on pain of forfeiture, and the acts contravening to be void; and George Steel, the disponent, or the other heirs and members of tailzie, were burthened with an annuity to a woman, and were in the same terms (heirs and members of tailzie) directed to apply for registration. The intention of the entailer was here quite clear, and that he considered he had fettered the institute under the title of a member of tailzie. Indeed, high authority has used the very same language, even the maker of the act 1686, Sir George Mackenzie, speaking of a proprietor in Scotland, says, “ he tailzies his lands in favour “ of a certain person who is called the institute, or first “ member of tailzie, whom failing, to the rest who are “ called substitutes, institute and substitute being terms “ borrowed from the civil law, and expressed by us in the “ first, second, and third members of tailzie ;” and Lord Kaimes in the Dictionary sanctions the same form of expression, calling the institute first member. It must therefore be admitted that *Steel v. Steel* is a strong case, and that possibly the leading view of institute and heir, which appears to have governed the former decisions, did not so necessarily apply here,—I mean the consideration that the institute is a purchaser or disponent taking by singular title and not by inheritance, and making up his titles as purchaser and not by service, while all the others are heirs in reality as well as name, and succeed to their seisin by service. Lord Eldon, however, held these considerations of no avail where he found “ mem- “ bers” used together with “ heirs,” and he disregarded the use of the expression members of tailzie by Sir George Mackenzie, observing that the act 1686 itself only touches the institute, and only allows him to be

MOREHEAD  
v.  
MOREHEAD  
and others.

31st Mar. 1835.

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

fettered by employing the word heir; so that he considered the Duntreath case as going very far, inasmuch as the institute, unless he can be called an heir for certain purposes, seems not to come within the Entail Act at all. I have already observed, that I do not go along with this remark on the Duntreath case, which only agrees with all that went before it. The case of *Miller v. Cathcart*, which occurred in February 1799<sup>1</sup>, is material to our present purpose, chiefly because it shows that the clearest indication of the entailer's sense of what he had done in the restrictive clauses,—nay, an express statement that he had done what he did not do in those clauses—is altogether inoperative, and has no power to extend the restrictions actually imposed. For in that case the deed says,—and almost says it in the clauses themselves, that “ notwithstanding the conditions, limitations, and “ restrictions put upon J. Taylor, institute, and the “ other aforesaid heirs of tailzie, any one of them succeeding shall have power to alter the entail for the “ purpose of continuing it in case the heir apparent “ should be affected with mental incapacity.” In the present case, according to the view I take of the special declaration, on which every thing turns, the reference to the disponent is only a statement of what the entailer understood himself to have done, or rather to intend doing, in the restrictive clauses. There remains to be mentioned the case of *Syme v. Ronaldson Dickson*<sup>2</sup>, which was decided against the institute, but in circumstances widely different from those of the present ques-

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<sup>1</sup> Mor. 15,471.

<sup>2</sup> 27 Feb. 1799. Mor. 15,473.

tion,—circumstances which supported as they called for that determination. The prohibitions are general against J. Ronaldson the disponent, and the other heirs of tailzie; and the eighth of the clauses expressly provides, that “if the said son,” (that is, the disponent,) “or any of the heirs of tailzie appointed to succeed to him,” (thus keeping the distinction of institute and substitute plainly and accurately in view,) “shall fail or contravene by contracting debt,” (and then follows a repetition or specification of the prohibited acts,) “then and in either of these cases the person or persons heirs of tailzie aforesaid so contravening shall forfeit.” This clause is free from all doubt; for the whole is one sentence, and the proposition is of course related to and governed by the condition,—“if the institute or substitutes contravene,” then the person or persons so contravening shall forfeit; that is, the person, whether institute or substitute, before named in the same sentence. No one can doubt that “person” means both institute and substitute previously mentioned; and to have held that it did not include the institute, merely because the entailer adds “heirs of tailzie aforesaid,” as if a disponent were an heir of tailzie, (the only conceivable ground of disputing the application of the fetters to the institute,) would be neither more nor less than holding that a person having done a certain thing by apt and sufficient words should be held not to have done it, because he afterwards uses words which show that he could give the person a wrong name, towards whom he had effectually done the thing. It would, moreover, be a most violent supposition to assume that any one could write such nonsense as this: If A. or B. shall do so and so, then B. doing so shall

MOREHEAD

v.  
MOREHEAD  
and others.

31st Mar. 1835.

**MOREHEAD**  
**v.**  
**MOREHEAD**  
**and others.**  
 —  
 31st Mar. 1835.

forfeit. That case may well stand then with the Findrassie and Duntreath cases, and all the rest, and has no bearing upon the present question. However, I hesitate not to say, that having to the full as clear an opinion that the present case has been wrong decided, as that the case of Syme v. Ronaldson Dickson is right, and holding it quite impossible to maintain the decision here without breaking in upon the whole current of authority, if driven to choose between affirming this decree and questioning that, I should, however reluctantly, recommend to your Lordships to adopt the latter alternative.

III. I have only now, in closing my argument, to take notice of the reasons given by the learned judges in the Court below, and I regret that we find so scanty a report of them. I can gather Lord Fullerton's view of the argument, which, though short and general, does not very materially differ from my own; but the reasons which conducted Lord Balgray and his learned brethren to their conclusions I nowhere can find. There appears to be an argument in what Lord Balgray is made to state, but when looked at it turns out to be merely the announcement of a conclusion—an opinion,—an opinion certainly entitled to the greatest deference, but not sufficient to support itself, when, being appealed from, the whole question in the Court above is, whether that opinion was well or ill founded; and we are compelled to inquire, not what the learned judges below thought and decided, but upon what grounds they did so. With all that Lord Balgray lays down in general terms as to the law of entail I go along. That an entail is not a technical deed,—that any one may make his own tailzie without professional aid,—that he may bind his successors in his own words

without any technical or fixed form of expression,—in all this I agree; but then I also agree with his Lordship in holding it quite clear that there must be in the deed, though it matters not in what place, “these concurring requisites,—the actual imposition of the requisite prohibitions, irritancies, and resolutions.” This being the admitted ground of the decision to be made, his Lordship says, that “keeping it in view, he apprehends the present entail cannot be impeached.” But as that is exactly the question,—the only point in dispute, we desiderate the reason why his Lordship considers that the acknowledged principles support the entail; in other words, we ask, where in the deed can we find the “actual imposition” of fetters on the disponent? His Lordship answers this essential question by saying, that we find the imposition in the general clause, which he then very correctly recites. Now, this is only shifting the essential question; for there being no doubt whatever that the fetters are, if at all, imposed by the connecting clause, the real point is, whether or not that clause does impose them on the institute? How is his Lordship represented as dealing with—as arguing that point? All he says is this: “By this clause the entailer appears to me to apply each and all of the clauses expressly to the institute as well as to the substitute;” but this is not giving a reason, it is only giving an answer to the question. The question is, has the general clause imposed the fetters; and if it has, why do you hold that opinion? And Lord Balgray answers, “It has imposed the fetters,” and gives no reason why he holds it to have done so. He adds, indeed, that a cause of hesitation with him is the insertion of the institute’s name in some of the restrictive clauses, and not in

MOREHEAD

v.

MOREHEAD  
and others.

31st Mar. 1835.

MOREHEAD  
v.  
MOREHEAD  
and others.  
—  
31st Mar. 1835.

others. No doubt this is the main argument against the opinion delivered by his Lordship. Then how does he answer this argument? He overrules it,—he decides against it, but he does not put it down by any reasoning at all. He only says, “ I am afraid this is not enough “ to free the institute.” But that is the whole question. Is this or not enough to free the institute, is exactly the question now before your Lordships, and then before the Court below. What ground does the learned judge assign for apprehending that the decision must be against the institute? He merely repeats once more, without any reason at all, the proposition that “ the general clause “ reaches the whole that follows, and applies the whole “ to the institute as well as substitute, making the entail “ good against him as well as against them.” Now that is exactly the matter in dispute between the parties ; and when one of these gives us a reason for holding that you ought to determine in his favour, that the fencing clauses sometimes omit and sometimes insert the institute’s name, it is, most assuredly, not enough to reply by merely repeating the proposition that you had decided against that party ; thus answering his argument against your opinion by simply repeating that opinion in the same words. The question is, has the entailer fettered the institute? You say he has ; the institute gives his reason for holding he has not. You meet his argument by repeating, “ the entailer has fettered the institute.” I desire to be understood as making no complaint against the learned judge for not having argued the question ; a judge’s office is, first of all, to decide ; and no one has any right to cavil at him, if he gives a distinct determination on the matters before him, merely because he assigns no reasons. But where his decision is to be



considered upon appeal, the only weight which it can have is that due to the reasons it rests upon ; and the party in whose favour it is given cannot support it by merely showing that the learned judge six times over gave the same opinion in different words. It may be a very good decision for the judge, but it is nothing of an argument for the party. The other learned judges merely concurred in Lord Balgray's opinion, and gave no reasons. Your Lordships are thus relieved from the difficulty which might have encumbered this case, had any reasons been assigned by the learned judges in the Court below for the decision which they pronounced ; and for the reasons and upon the grounds which I have stated at great, but I think not at unnecessary, length, I humbly move your Lordships that the interlocutor appealed from be reversed. I should, in regard to the importance of the question, have wished to add a declaration, that no general words referring to a disponee and to heirs of tailzie can fetter the disponee if the restrictive clauses do not directly apply to the disponee, and if the general words taken together with the particular clauses are capable of a construction which does not necessarily comprehend the disponee within the latter by force of the former. As, however, your Lordships may observe, that this position goes beyond the exigency of the present case, (although I have a clear opinion upon it,) I do not recommend its being added to the order of reversal, which will simply stand thus: Reverse; decern for the pursuer in the declarator; and in the suspension find the letters orderly proceeded.

MORRHEAD  
v.  
MORRHEAD  
and others.

—  
31st Mar. 1835.

The House of Lords accordingly ordered and adjudged,  
“ That the interlocutor complained of in the said appeal be,  
“ and the same is hereby reversed: And it is further ordered,

**MOREHEAD**    “ That the cause be remitted back to the First Division of  
                  “ the Court of Session, with instructions that in the process  
**MOREHEAD**    “ of declarator they do find and declare in terms of the several  
and others.    “ conclusions of the libel, and decern; and that in the process  
                  “ of suspension they do find the letters orderly proceeded  
31st Mar. 1835. “ in, and decern.”

S. B. JACKSON — RICHARDSON and CONNELL,—  
Solicitors.

[31st March 1835.]

Mrs. ANN HAMILTON, Widow of Alexander Gray,  
Appellant.—*J. A. Murray.*

ALEXANDER Duke of HAMILTON, Respondent.  
*Lushington — Keay.*

*Teinds — Entail — Warrandice.* An excambion was made under the statute 10 Geo. 3. c. 51. between the proprietor of an entailed estate and another proprietor, by which it was declared that all lands given by the entailed proprietor should be held of him for delivery of a certain quantity of meal and payment of a sum of money, “in feu of all feu and teind duties;” and the entailed proprietor was titular of the parish, but he did not transact in that character. Held (affirming the judgment of the Court of Session) That under the circumstances the other party was not entitled to insist that the meal and money so payable should be allocated primo loco as free teinds in the titular’s hands.

BY the statute 10 Geo. 3. cap. 51. ss. 32 and 33 (1770),  
on the preamble that, “whereas it may frequently  
“happen that the enclosing of lands in Scotland may  
“be retarded or prevented, or at least rendered incon-  
“venient, by heirs of entail not having it in their power  
“to exchange small parcels of the lands of their en-  
“tailed estates for other lands convenient for the  
“entailed estate, and more conducive to the improve-  
“ment of the country in general: for remedy whereof  
“be it enacted by the authority aforesaid, that it shall  
“and may be lawful for proprietors of entailed estates  
“to excamb, or make exchanges of land, with all and

1ST DIVISION.

Ld. Newton.

HAMILTON  
 DUKE OF  
 HAMILTON.  
 ———  
 31st Mar. 1835.

“ every person or persons for the conveniency and ad-  
 “ vantage of the said estates and for the improvement  
 “ of the country where such estates are situated, by  
 “ enclosing or otherwise ; provided that not more than  
 “ thirty acres of arable land, nor more than 100 acres  
 “ of lands consisting of hills or other grounds incapable  
 “ or improper by their nature for culture by the plough,  
 “ of such entailed estates lying together in one place or  
 “ plot shall be given in exchange, and that an equivalent  
 “ in land contiguous to the entailed estate with which  
 “ the exchange is to be made shall be received in place  
 “ of the land given in exchange.” It is then provided  
 that for the purpose of ascertaining and adjusting the  
 value of the lands proposed to be exchanged, an appli-  
 cation shall be made by the proprietor of the entailed  
 estate to the sheriff of the county within which the estate  
 is situated, “ who thereupon shall appoint two or more  
 “ skilful persons to inspect and adjust the value of the  
 “ lands proposed to be excambed or exchanged ; and  
 “ upon such persons settling the marches of the lands  
 “ proposed to be exchanged, and reporting upon oath  
 “ that the exchange will be just and equal,” the sheriff  
 is “ required to authorize the exchange to be made by  
 “ a contract of excambion, and which being executed  
 “ and recorded in the sheriff books within three months  
 “ after the execution thereof, the same shall be effec-  
 “ tual to all intents and purposes, and the land given in  
 “ exchange to the entailed estate shall be held to be a  
 “ part thereof, and shall be subject to all the prohi-  
 “ bitory, irritant, and resolute clauses of the entail,  
 “ in the same manner as if it had been originally a part  
 “ of the estate, and the lands given from the entailed  
 “ estate shall from thenceforth be held as out of the

“ entail and be liberated from all the prohibitory, irri-  
 “ tant, and resolute clauses thereof.”

HAMILTON  
 v.  
 DUKE OF  
 HAMILTON.  
 —  
 31st Mar. 1835

Douglas Duke of Hamilton, the heir in possession of the entailed estates of Hamilton, being desirous to exchange the lands of Bothwell Park, forming part of the entailed estate, for certain lands in the haugh of Hamilton which then belonged to William Hamilton upholsterer in Edinburgh, arrangements were made between them for accomplishing this object. The lands of Bothwell Park are situated within the parish of Bothwell, while those of the haugh of Hamilton lie within the parish of Hamilton. At this time no stipend had been allocated to the minister of Bothwell on the teinds of the lands of Bothwell Park; but stipend had been allocated to the minister of Hamilton out of the teinds of the lands situated in the haugh of Hamilton. This stipend amounted to one boll six pecks and one lippie of meal, and 1*l.* 1*l*s. 11*d.* sterling of money teind; the feu duty was 5*s.* 3*¼d.* sterling.

In prosecution of their object, the Duke and Mr. Hamilton presented in 1791 a petition to the sheriff of Lanarkshire, setting forth “ that the petitioner William  
 “ Hamilton is proprietor of some grounds in the haugh  
 “ of Hamilton, lying very commodious to and nearly  
 “ adjoining to the policy and pleasure ground at the  
 “ palace of Hamilton belonging to the said Duke, and  
 “ which grounds his Grace was desirous to get right to  
 “ by excambion, in terms of the late act of parliament  
 “ relative to entails, in order that he might enclose the  
 “ same within his policy, and plant or otherwise improve  
 “ them; and, in exchange for the grounds thus desired,  
 “ his Grace was willing to give off to the petitioner  
 “ William Hamilton as much of the lands of Bothwell

HAMILTON  
v.  
DUKE OF  
HAMILTON.  
—  
31st Mar. 1835.

“ Park, lying in the parish of Bothwell and shire of  
“ Lanark, as should be of equal value to the lands to  
“ be got from him; and which lands of Bothwell Park  
“ are part of his Grace’s entailed estate, presently  
“ rented by tenants under his Grace, and in no shape  
“ connected with any mansion-house, policy, or pleasure  
“ ground of said estate: that the petitioner William  
“ Hamilton was equally desirous such an excambion  
“ should take place, and therefore it was proposed that,  
“ in terms of the act of parliament anno 1770, con-  
“ cerning lands under entail, and authorizing an ex-  
“ change or excambion of certain parcels of land  
“ situated in the manner that these above mentioned  
“ are, there should be given off to the said William  
“ Hamilton and his heirs such part of the said lands of  
“ Bothwell Park, under thirty acres, as should be  
“ found equivalent in value to the grounds in the haugh  
“ of Hamilton belonging to him, presently held by him  
“ under the said Duke, and to be conveyed to his Grace  
“ and his heirs of entail in excambion for part of the  
“ foresaid lands of Bothwell Park.” They therefore  
prayed the sheriff “ to take the proper steps for ascer-  
“ taining and adjusting the value of the lands proposed to  
“ be exchanged; settling the quality and marches thereof;  
“ authorizing the exchange, and doing every thing neces-  
“ sary for carrying the intention of the parties, peti-  
“ tioners, into execution, as the aforesaid act directed.”

The sheriff made a remit in terms of the act of parliament to persons of skill, who reported, “ that the  
“ lands lying in the haugh of Hamilton, belonging  
“ to the said William Hamilton, and proposed to be  
“ given off to the said Duke of Hamilton, lie very  
“ commodious to, and part of them within and others

“ nearly adjoining to the policy and pleasure ground  
 “ at the palace of Hamilton belonging to the said  
 “ Duke;” “ and that the part of the lands of Both-  
 “ well Park, lying in the parish of Bothwell and sheriff-  
 “ dom of Lanark foresaid, proposed to be given off  
 “ to the said William Hamilton in exchange for the  
 “ foresaid lands in the haugh of Hamilton, are not  
 “ connected with any mansion-house, policy, or pleasure  
 “ ground belonging to his Grace, but lie distinct there-  
 “ from.” After describing the several lands they farther  
 reported, “ that the said respective lands above specified  
 “ are of equal value, and the proposed excambion for  
 “ the accommodation and benefit of the said Duke,  
 “ and equally beneficial and commodious for the said  
 “ William Hamilton; declaring, that as the ground pro-  
 “ posed to be got by the said Duke stands burdened  
 “ with 5s. 3½d. sterling of feu duty, payable to his  
 “ Grace and his heirs of entail, and one boll six pecks  
 “ one lippie of meal teind, and 1l. 11s. 11d. sterling of  
 “ money teind, payable to the minister of Hamilton,  
 “ the foresaid part of the lands of Bothwell Park pro-  
 “ posed to be given in exchange to the said William  
 “ Hamilton fall to stand burdened with the like feu  
 “ and teind duties, payable to his Grace and his heirs  
 “ of entail, in full of all feu and teind duties that can be  
 “ asked and required furth of the said part of the lands  
 “ of Bothwell Park; and each party paying land tax  
 “ and other public burdens effeiring to the valuation  
 “ of 40l. 9s. 10d. as the proportion of valuation cor-  
 “ responding to the foresaid lands in the haugh of  
 “ Hamilton, belonging to the said William Hamil-  
 “ ton.” After they had made oath to the truth of this  
 report, the sheriff pronounced this judgment: —

HAMILTON  
 v.  
 DUKE OF  
 HAMILTON.

31st Mar. 1835.

HAMILTON  
v.  
DUKE OF  
HAMILTON.  
—  
31st Mar. 1835.

“ In respect it appeared by the said report that  
“ the grounds proposed to be exchanged, as bounded  
“ and described in the report, are of just and equal  
“ value, therefore the sheriff authorized the same  
“ to be made by a contract of excambion; which after  
“ being executed and recorded within three months  
“ after the execution thereof, in terms of the act of  
“ parliament referred to in the petition, the same shall  
“ be effectual to all intents and purposes, as directed  
“ by the said act, and decerned accordingly.”

A contract in these terms was executed on the 30th of October and recorded on the following day.<sup>1</sup> In particular, his Grace disposed to Hamilton the lands of Bothwell Park, “ to be holden, the said lands, by the  
“ said William Hamilton and his foresaids immediately  
“ of and under the said Douglas Duke of Hamilton  
“ and Brandon and his foresaids in feu farm, fee, and  
“ heritage for ever, for the yearly payment by the said  
“ William Hamilton and his foresaids to the said noble  
“ Duke and his foresaids of the sum of 5s. 3½d. sterling  
“ in name of feu duty, and delivery yearly of one boll  
“ six pecks and one lippie of oatmeal, and payment of  
“ 1l. 11s. 11d. sterling yearly, for victual and money  
“ teind of the said lands; and that in full of all feu and  
“ teind duties that can be asked and required furth of  
“ the said lands in time coming;” “ and the heirs of the  
“ said William Hamilton doubling the foresaid feu duty  
“ of 5s. 3½d. sterling the first year of their entry to the  
“ foresaid lands, as use is of feu farm; and that for all

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<sup>1</sup> Similar applications and contracts were made at a later period in reference to certain other portions of the land, but it is unnecessary to notice them more particularly.



“ other burden, exaction, question, demand, or secular  
 “ service which can be asked or required furth of the  
 “ said teinds and others, by the said Duke or his fore-  
 “ saids in all time coming.” Both parties bound them-  
 selves “ reciprocally, and their foresaids, to warrand  
 “ and maintain the specific subjects alternately dispo-  
 “ by them in manner above expressed, to be good and  
 “ sufficient to the party receiver and his above named,  
 “ at all hands and against all deadly, as law will ; and  
 “ also to acquit and disburden the same of all feu,  
 “ blench, and tythe duties, supplies, or other public or  
 “ real burdens with which they shall be affected at  
 “ the term of Martinmas 1790, being the period of  
 “ time from which their respective entries did com-  
 “ mence.”

HAMILTON  
 v.  
 DUKE OF  
 HAMILTON.  
 —  
 31st Mar. 1835.

The Duke was titular of the parish of Bothwell, but neither in the application to the sheriff nor in the contract of excambion was he alluded to in this character.

The minister of Bothwell having instituted a process of augmentation of stipend, modification, and locality, and an augmentation having been awarded, and the appellant Mrs. Ann Hamilton (who had succeeded to Mr. Hamilton) having been called as one of the heritors, she maintained inter alia that, in virtue of the contract of excambion, the stipend effeiring to the property received by Mr. Hamilton from the Duke, ought to be allocated upon his Grace, he being bound to relieve the lands of all stipend payable from the same ; or at all events, that the meal and money teind, payable by the contract to his Grace in name of teind duty, being free teind payable to the titular, fell to be allocated upon for stipend primo loco.

HAMILTON  
v.  
DUKE OF  
HAMILTON.  
—  
31st Mar. 1835.

This was disputed by the Duke, who maintained that the meal and money teind payable to him out of the lands of Bothwell Park were not in respect of any conveyance of the teinds by him as titular to Mr. Hamilton, but merely to equalize the exchange, seeing that a corresponding burden then existed over the lands which had been disposed to him.

Lord Newton on the 7th of July 1828 pronounced this interlocutor:—“ Finds, that the burden upon  
“ Mrs. Hamilton, in name of teind duty by the contract  
“ of excambion between her and the Duke, being free  
“ teind exigible by the titular, falls to be allocated for  
“ stipend primo loco. Quoad ultra, finds, that Mrs. Ha-  
“ milton, having an heritable right to the teinds of the  
“ lands excambed to her, must be allocated on for sti-  
“ pend pari passu with other heritors in the same situa-  
“ tion: Repels the claim of relief by Mrs. Hamilton  
“ against the Duke, of augmentations that may fall upon  
“ her.” The Duke having reclaimed, praying the  
Court to “ find that the annual burdens or teind duties  
“ in the several contracts of excambion are not to be  
“ considered as free teind, and to be allocated upon for  
“ stipend primo loco, but must be paid by Mrs. Hamil-  
“ ton to the Duke of Hamilton as his exclusive property,  
“ without any respect to the allocation of stipend,”  
their Lordships, on the 8th of July 1828, pronounced  
this judgment:—“ Find that the annual burdens or  
“ teind duties in the several contracts of excambion are  
“ not to be considered as free teind and to be allocated  
“ upon for stipend primo loco, but must be paid by  
“ Mrs. Hamilton to the Duke of Hamilton as his ex-  
“ clusive property, without any respect to the allocation  
“ of stipend: Recall the Lord Ordinary’s interlocutor,

“ so far as inconsistent with this finding, and remit  
 “ the cause back to his Lordship to proceed with the  
 “ same.”<sup>1</sup>

HAMILTON  
 v.  
 DUKE OF  
 HAMILTON.

31st Mar. 1835.

After certain farther proceedings unnecessary to be noticed—

Mrs. Hamilton appealed.

*Appellant.*— It is admitted by the respondent that he is titular of the parish of Bothwell, and the established rule of allocation, as stated by Mr. Erskine,<sup>2</sup> is that “ where the tithes of a parish have not been affected “ with any grant in favour of a layman, these ought, in “ the first place, to be applied to the maintenance of the “ minister, to which all tithes were originally destined. “ In default of these, the tithes which are yet in the “ hands of the lay titular fall, in the second place, to “ be allocated; for, as the titular of a benefice who “ himself cannot serve the cure is bound to employ a “ person who can, the burden of the stipend ought to “ fall on such titular, as long as he has a sufficient fund “ in his own hands, rather than upon those to whom he “ has granted leases or heritable rights of the tithes; “ and if the titular does not draw the tithe in kind but “ receives a tack duty, such tack duty is burdened, “ since that is the benefit arising to the titular from his “ right. These two kinds are usually called free tithes.” It is immaterial whether the duty be payable as tack or as feu duty.<sup>3</sup> But in the present case the lands were

<sup>1</sup> S. D. Teind Cases, 171.

<sup>2</sup> 2 Erskine, 10, 51.

<sup>3</sup> Statute 1587, c. 59; Forbes on Tythes, part 2, c. 6.; Mackenzie's Observations on the Act 1587; Duke of Douglas v. Elliot, 1 Feb. 1738, (Mor. 15,657); Lord Dundas v. Balfour, 17 Nov. 1802, (Mor. 15,709).

HAMILTON  
v.  
DUKE OF  
HAMILTON.  
—  
31st Mar. 1835.

granted by the Duke, who was then titular, to be holden of him for payment of the sums there mentioned “in full of all feu and teind duties that can be asked and required furth of the said lands in time coming;” it is clear therefore that these must be allocated primo loco and before imposing any stipend on the heirs of the lands.

Although the judgment of the Court does not set forth the ground on which their Lordships differed from Lord Newton, yet it was understood to be that the feu and teind duty had been imposed as a burden on Bothwell park to equalize the exchange, and that unless the teind duty were payable to the Duke without reference to any allocation of stipend the exchange could not be considered equal. But this view of the question originates in a fallacy. Perfect equality could only be preserved by regarding the teind duties as free teind. If the whole duties were allocated, then there would be perfect equality on either side; if only part were allocated, the remaining part would be payable to the Duke until it came to be exhausted by new allocations. But according to the judgment of the Court below, the appellant is bound to pay the whole teind duty to the Duke, while at the same time she is ordained to pay the same amount to the minister of Bothwell, so that she has been subjected in twice the amount of the burden. There is thus a plain inequality created by the judgment which it was the very object of the Court below to prevent.

*Respondent.* — In entering into the contract of exchange, the Duke of Hamilton did so exclusively in the character of proprietor or heir in possession of the

entailed lands, and not at all as titular of the teinds; accordingly there is no conveyance either in feu or in lease of the teinds themselves, and consequently there could be no tack duty, or feu duty payable in respect of the teinds. The appellant is thus attempting to apply the rule of law regarding the allocation of free teind *primo loco*, to a case where there is no room for its application.

HAMILTON  
v.  
DUKE OF  
HAMILTON.

31st Mar. 1835.

In the report by the valuator to the sheriff they state that the respective lands are of equal value, but that as those proposed to be given to the Duke by Mr. Hamilton were burdened with feu and stipend, they suggested that those of Bothwell Park should “stand burdened with the like feu and teind duties,” so as to equalize the burdens subject to this provision, “each party paying the stipend which may affect the lands reciprocally got in exchange.” In truth the burden is not teind duty at all, but is an annual duty payable to the Duke for the ground he gave to Mr. Hamilton in exchange. Besides, even if it were regarded as teind duty, it is teind duty of the parish of Hamilton, and not of the parish of Bothwell, and therefore can in no point of view be available to the minister of Bothwell.

LORD BROUGHAM:—My Lords, in the case of *Hamilton v. Hamilton* I do not feel it necessary to go at length into the particulars, and therefore shall not do so at this late hour of the day, as I fully concur in the judgment which has been pronounced by the Court below. I would move your Lordships that it be affirmed, but without costs.

**HAMILTON**      The House of Lords accordingly ordered and adjudged,  
                  <sup>v.</sup>  
                  **DUKE OF**      “ That the said petition and appeal be, and is hereby dis-  
                  **HAMILTON.**      “ missed this House, and that the interlocutors, so far as  
                  —  
31st Mar. 1835.      “ therein complained of, be, and the same are hereby  
                  “ affirmed.”

**S. B. JACKSON—RICHARDSON and CONNELL,—**  
**Solicitors.**

[1st April 1835.]

JOHN JACK, Appellant.—*A. Maconochie — Stuart.*

WILLIAM LYALL, Respondent.—*Sir John Campbell —  
A. M'Neil.*

*Servitude.* Circumstances in which a servitude of eavesdrop was sustained in favour of one party over the property of another.

*Process — Appeal.* A proof was taken before the bailies of a burgh, and in an advocacy the Lord Ordinary pronounced a special judgment on the facts; a relative action of declarator was brought by the advocator, and of consent of parties the proof was held as repeated in the declarator, and the processes were conjoined, and the respondent was assoilzied. An objection by the respondent to an appeal entered in the conjoined processes that it was incompetent under 6 Geo.4. c.120. s.40. sustained in so far as the appeal related to the matters of fact.

IN the month of September 1830 John Jack, grocer in Paisley, presented a petition to the magistrates and Liners of Paisley, setting forth “that the petitioner is  
“ proprietor of a tenement in High Street of Paisley,  
“ and of some houses at the back, which are bounded  
“ on the east by the property of Mr. William Lyall,  
“ grocer in Paisley: That the petitioner is at present  
“ rebuilding a back room, and some doubts are entertained by the petitioner and Mr. Lyall as to the line  
“ of march between their properties and their respective  
“ rights, and therefore he wishes a visit and report by  
“ the liners of the burgh, and a sentence by your  
“ honours thereon.” He therefore prayed the magis-

1ST DIVISION.

Ld. Medwyn.

JACK  
v.  
LYALL.  
1st April 1835.

trates “ to appoint the liners of the burgh to visit the  
“ premises, and report as to the line of march between  
“ the properties of the petitioner and the said  
“ Mr. William Lyall, and their respective rights of  
“ property, and to approve of and decern in terms of  
“ such report.”

Lyall in defence stated that the spot of ground upon which Jack proposed to build was immediately contiguous to the west wall of Lyall’s back shop, from the roof of which he had right to a servitude of water-drop on that part of Jack’s ground on which Jack intended to build. He farther stated that on the same line of march he was proprietor of a house three stories in height, which had the same water-drop to the west upon the property of Jack.

The magistrates on the 27th of September appointed the liners to meet upon the ground in dispute on the following day, which they accordingly did, but reported that they could form no judgment upon the question till proof had been adduced by parties of their several allegations. A proof was in consequence allowed by the bailies, but before it was taken, Lyall, (on the 2d of October 1830,) presented a petition to the magistrates, in which he prayed them “ to conjoin this appli-  
“ cation with that at the instance of the said John Jack,  
“ or to proceed separately, as to your honours may  
“ appear advisable, and, with the assistance and advice  
“ of the liners of the burgh, to fix and determine the  
“ line of march of that part of parties’ properties in  
“ High Street of Paisley not considered to be specially  
“ included in the said other application, at the instance  
“ of the said John Jack, and to find whether the peti-  
“ tioner is not entitled to an eavesdrop along his west



“ boundary, and which is contiguous to that of the said  
 “ John Jack ; and also to find the said John Jack liable  
 “ in expences ; reserving to the petitioner to make  
 “ such farther application as he may be advised, after  
 “ the said boundaries are determined, for the removal  
 “ of any building or buildings erected on the petitioner’s  
 “ march, and in particular of some cellars which have  
 “ been recently built by the said John Jack.” This  
 petition was opposed by Jack on various preliminary  
 pleas, but the magistrates repelled them, and appointed  
 the liners to meet and hear parties ; which they did, and  
 reported that the two petitions should be conjoined and  
 parties allowed a proof. An interlocutor to this effect  
 was pronounced ; and the proof having been adduced  
 and considered by the liners, they unanimously “ found  
 “ that the said William Lyall has right to an eavesdrop  
 “ along the whole of his west boundary, northward  
 “ from the back wall of the houses of parties fronting the  
 “ High Street ;” and on the 4th of March 1831 the  
 magistrates decerned in terms of this report, and found  
 Jack liable in 48*l.* 4*s.* 2*d.* of expences.

JACK  
 v.  
 LYALL.

1st April 1835.

Jack thereupon brought the case under review of the  
 Court of Session by advocacy, and at the same time  
 raised a summons of declarator against Lyall, in which  
 after describing their respective properties he set forth,  
 “ That between the two properties there has existed for  
 “ a period much beyond the years of the long pre-  
 “ scription a dyke running backwards from the High  
 “ Street of Paisley as far as the properties of the said  
 “ defender extend, which dyke formed and has always  
 “ been understood to form the march line between the  
 “ properties of the pursuer and defender : That the said  
 “ march dyke was meant and intended as a division

JACK  
v.  
LYALL.  
—  
1st April 1835.

“ wall to enclose the said property now belonging to  
“ the said defender, and was accordingly built at the  
“ utmost western extremity thereof, so as to include all  
“ the property on that side ; and, being a division wall,  
“ it was necessarily exclusive of any right of stillicidium  
“ to the west of the line so marked out by the defender’s  
“ predecessors as being the extremity of their property  
“ to the west : That accordingly the predecessors of the  
“ pursuer considered that, as the defender’s predecessors  
“ had availed themselves by that mode of every inch of  
“ their property, they were entitled to make use of their  
“ property up to the line of demarcation so fixed by the  
“ predecessors of the defender ; and acting upon this  
“ indisputable and, till within these few years, undis-  
“ puted right, they at different times erected various  
“ buildings, consisting of coal houses and others, close  
“ up to the wall in question, and excluding, as they  
“ were entitled to do, any space for a stillicidium to  
“ which a division wall is not by law entitled.” He  
then alleged that Lyall and his predecessors had ille-  
gally erected two houses upon his property, and in  
place of confining the west wall so far within the line  
of the division wall as to make the eavesdrop fall within  
its site, the line of the division wall was used as the  
site of the west wall of the house, so that the slates  
on the roof projected three and a quarter inches beyond  
the site of the division wall. He therefore concluded that  
it should be found, “ that the said property belonging  
“ to the pursuer extends eastward to the said march  
“ dyke, and that he is entitled to build erections of any  
“ kind whatsoever close thereto, without allowing to the  
“ said defender any room for an eavesdrop to any build-  
“ ing which he has erected, or may erect upon the said

“ line; that the said defender and his predecessor had  
 “ no right to encroach upon the property of the pursuer  
 “ by the erection of the said two houses whose roofs  
 “ extend beyond the line of march fixed by the said  
 “ wall; and that the said defender ought and should be  
 “ decerned and ordained to pull down and remove the  
 “ said houses, so far as they form encroachments as  
 “ aforesaid; or otherwise, that he should be decerned  
 “ and ordained to pay to the pursuer the sum of 1,000*l*,  
 “ in name of damages sustained and to be sustained by  
 “ him by and through the said illegal encroachment;  
 “ or otherwise, that the only existing and available ex-  
 “ ception to the pursuer’s right to his said property  
 “ close up to the said division wall, and throughout the  
 “ whole line thereof, and as far as the same extends,  
 “ consists of the said two houses which the defender or  
 “ his predecessors or authors have erected on the said  
 “ line, and that to the extent of the form and situation  
 “ which such houses at present enjoy; or otherwise, that  
 “ the pursuer has by his original vested right, or at least  
 “ by an acquired right of servitude, the sole and exclu-  
 “ sive right to the whole existing stances and situations  
 “ occupied by all the back houses which his predecessors  
 “ erected on his said property, and which extend close  
 “ up to the said division wall, and may use the same for  
 “ these erections, or for any erections he may think  
 “ proper, or at least for any erections of a nature similar  
 “ to those presently existing, and that in all time to  
 “ come.”

JACK

v.

LYALL.

1st April 1835.

Lyall pleaded in defence that the decree of the magis-  
 trates formed *res judicata*, as by it the line or boundary  
 between the properties had been fixed, and at all events  
 the claim was unfounded.

JACK  
v.  
LYALL.

1st April 1835.

A separate record was made up in the action of declarator which depended before Lord Fullerton. The advocacy came before Lord Medwyn, who, by an interlocutor (20th June 1832) containing special findings as to the matters of fact, affirmed the judgment of the magistrates by repelling the reasons of advocacy, remitting simpliciter and finding expences due.

Jack reclaimed, and the record in the declarator being now closed, Lord Fullerton reported it to the Inner House, and the following minute was thereupon lodged by the parties :—

“ Forsyth, for the advocator (Jack), stated that an action of declarator relative to the same subject had been raised in this Court at the instance of the advocator, and a record completed and closed ; and in respect that the parties consider it unnecessary to have recourse to further proof than has been already brought forward by them, upon which they are willing to rely ; therefore the advocator John Jack consented, and hereby consents and agrees, upon the process of declarator being remitted to the Inner House and conjoined with the process of advocacy, that the proof led in the inferior Court, and brought under review in the advocacy, shall be held as repeated in the conjoined actions, and received by the Court as a proof concluded by the parties respectively, not only in the advocacy, but also in the action of declarator.

“ A. M’Neill, for the respondent Mr. Lyall, consented, and hereby consents and agrees, to the above arrangement on the part of his client.”

The Court (16th Jan. 1833) thereupon allowed mutual minutes of debate on the proof, and conjoined the two actions. On advising them (12th June 1833)

their Lordships in the advocacy adhered to the interlocutor of Lord Medwyn, and in the declarator assoilzied Lyall, and found Jack liable at expences, which were taxed at 159*l.* 15*s.*<sup>1</sup>

JACK  
v.  
LYALL.  
—  
1st April 1835.

Jack appealed.

*The Respondent* pleaded as a preliminary objection, that by the statute 6 Geo. 4. c. 20, s. 40, it is enacted, “ that  
“ when, in causes commenced in any of the courts of the  
“ sheriffs, or of the magistrates of burghs, or other inferior  
“ courts, matter of fact shall be disputed, and a proof shall  
“ be allowed and taken according to the present practice,  
“ the Court of Session shall, in reviewing the judgment  
“ proceeding on such proof, distinctly specify in their  
“ interlocutor the several facts material to the case  
“ which they find to be established by the proof, and  
“ express how far their judgment proceeds on the mat-  
“ ter of fact so found, or on matter of law, and the  
“ several points of law which they mean to decide; and  
“ the judgment on the cause thus pronounced shall be  
“ subject to appeal to the House of Lords, in so far  
“ only as the same depends on or is affected by matter  
“ of law; but shall, in so far as relates to the facts, be  
“ held to have the force and effect of a special verdict of  
“ a jury, finally and conclusively fixing the several  
“ facts specified in the interlocutor:” “ But it is hereby  
“ expressly provided and declared, that in all cases  
“ originating in the inferior courts, in which the claim  
“ is in amount above 40*l.*, as soon as an order or  
“ interlocutor allowing a proof has been pronounced  
“ in the inferior court, (unless it be an interlocutor

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<sup>1</sup> 11 Shaw, Dunlop, and Bell, 711.

JACK  
v.  
LYALL.  

---

1st April 1835.

“ allowing a proof to lie in retentis, or granting diligence  
“ for the recovery and production of papers,) it shall be  
“ competent to either of the parties, or who may con-  
“ ceive that the cause should be tried by a jury, to  
“ remove the process into the Court of Session by bill  
“ of advocation, which shall be passed at once without  
“ discussion and without caution; and in case no such  
“ bill of advocation shall be presented, and the parties  
“ shall proceed to proof under the interlocutor of the  
“ inferior court, they shall be held to have waived their  
“ right of appeal to the House of Lords against any  
“ judgment which may thereafter be pronounced by the  
“ Court of Session, in so far as by such judgment the  
“ several facts established by the proof shall be found or  
“ declared.” In the present case the proof was taken  
before the magistrates, and an interlocutor specially  
finding the facts was pronounced by the Lord Ordinary  
and adhered to by the Court. This therefore is equiva-  
lent to a special verdict, and cannot be reviewed by this  
House; and as the advocation was incorporated into  
the action of declarator, which cannot now be disjoined  
from it, the appeal is altogether incompetent.

*The Appellant* answered that the rule of the statute did not apply to any action instituted originally in the Court of Session, and that if the proof had been taken in the action of declarator in place of in the process before the magistrates he could clearly not have been prevented from appealing against any judgment pronounced in the declarator. But the respondent had concurred with the appellant to dispense with the re-examination of the witnesses in the declarator, and to hold the proof which had been previously taken in the advocation to be held

as repealed in that process. The question of competency must therefore be judged of as if the proof had been adduced in the declarator, in which case an appeal would clearly have been competent. If so, then the circumstance of the advocacy being conjoined with the declarator could not exclude an appeal, and the declarator was a sufficient process of itself to enable justice to be done between the parties. Besides, the respondent must be held, by entering into the minute relative to the proof, to have waived the objection of incompetency even as to the advocacy.

JACK  
v.  
LYALL.  

---

1st April 1835.

(On the merits, the parties pleaded mainly on the titles and the proof, which did not involve any point of general importance.)

LORD BROUGHAM: — My Lords, in the case now under consideration there are two questions raised by this appeal; the first, whether we are entitled, under the Judicature Act of the 6th of George the Fourth, to go into the merits of the case and the evidence; and the second, whether, if we are excluded from looking into the evidence, — there is a matter of law now before you which will entitle you to reverse the decision of the Court below? Upon the first question I have already stated my opinion, in several observations which I have thrown out, that this case, although not within the express terms of the act of George the Fourth, is clearly within its intention. If we were allowed to go into the evidence upon the footing of its being not evidence in this particular action, but evidence in another action which was afterwards conjoined with this, we should open a door to introduce all the

JACK  
v.  
LYALL.  

---

1st April 1835.

bearings of the proof to be discussed at the bar before us, who had seen none of the witnesses any more than the Court below had seen them. If the appellant were successful because the interlocutor, which has the force of a special verdict, did not happen to be pronounced in the action of declarator, as well as in the advocacy,—if that were deemed sufficient to frustrate the provision making the interlocutor final, the provision would be entirely evaded. What is it that brings the appeal before us? Is it not the interlocutor and the evidence essentially? The evidence and all the proceedings were imported into the declarator by the minute signed by Mr. Jack's counsel; the two actions were substantially in the same matter; they were joined together; that let in the evidence, and the interlocutor of Lord Medwyn on the advocacy; otherwise the Court of Session proceeded to deal with the declarator without any evidence at all. But the joinder of the two by consent imported the evidence into it, and it became one action; and the importing the evidence and interlocutor into the declarator brought it within the scope of the act of the 6th of George the Fourth, making the interlocutor not merely a special verdict on the advocacy, which the act in terms makes it, but also on the declarator, which is joined with the advocacy, and thus excluding the consideration of the evidence in the declarator as well as in the advocacy. There is no doubt that this part of the case is against the appellant; but the special verdict may not lead to the conclusion which the Court came to in favour of the respondent, and against the appellant; and that raises the second question, whether or not it



has been rightly dealt with or decided in the Court below. Nothing is better known than the course of proceeding in Scotland to protect you from servitude by your neighbour, or as establishing your own claim to freedom from servitude. You may have a declaratory action to establish servitude, or to declare your premises free from the right of servitude; and you may have an action in the nature of an action for trespass, complaining of the person exercising the right of servitude over your ground; and that person may set up a right of way in his justification. But was that the course of proceeding adopted by Mr. Jack in bringing the matter into the Court below, or was it even the course adopted in the Court of Session? No such thing. Mr. Jack brings not an action of declarator of freedom from servitude, nor an action of trespass, but an action of lining. He presents a petition to the Dean of Guild, stating himself to be proprietor of a tenement and some houses bounded on the east by the property of Mr. Lyall. When I say that my close is bounded by your property, I do not give you a right to that boundary. Perhaps I may say your property to the east of mine is the boundary; but the question may very likely be how the line is to run between us. It is there stated that the petitioner is at present rebuilding a brick wall, and some doubts are entertained. Now observe that the doubts are not as to a claim of servitude, but some doubts are entertained as to the line of march between their properties and as to their respective rights. An action as to a right of servitude would proceed on the opposite of this. It would say, — “Whereas there is “no doubt as to the boundary of the two contiguous

JACK  
v.  
LYALL.

1st April 1835.

JACK  
v.  
LYALL.  
1st April 1835.

“ premises, — whereas this is the boundary wall — the  
“ common boundary, yet true it is, that A. B. claims  
“ a right of servitude to his premises over mine; there-  
“ fore I claim to have it declared that I am not subject  
“ to the easement.” So if it was put in the nature of  
an action of trespass, it would be said “ that he has tres-  
“ passed over my land, and I claim reparation for the  
“ trespass.” But that is not the case here, it is a dispute  
as to the line of march; therefore he wishes the visit  
and report of the liners. The liners being the council  
of the Dean of Guild, it was peculiarly appropriate to  
them to deal with the question of boundary; but what  
have they to do with the question of servitude? It is  
the Court that has to deal with the question of servi-  
tude. When the liners have said how far the boun-  
dary goes, then arises the question, whether the man  
upon the east of the line has a right to come upon the  
ground to the west. It is only after the boundary has  
been ascertained, that the question of servitude can  
arise. The petition says, “ May it therefore please  
“ your honours to appoint the liners of the burgh to  
“ visit the premises, and report as to the line of march  
“ between the properties of the petitioner and the said  
“ Mr. William Lyall, and their respective rights of pro-  
“ perty.” The respondent Lyall in his answers says,  
“ that the shop was formerly a thatched house of one  
“ storey in height, having the usual drop falling to the  
“ east and west, and of course having a drop on that  
“ part of the petitioner’s grounds where he intends at  
“ present to make the said erection.” It then goes  
on to say, “ that within the years of prescription  
“ Mr. John Sheddan, the respondent’s predecessor,

“ raised the west wall of this back house, sloping the  
 “ roof for about twelve or fourteen feet to the east, but  
 “ sloping the rest of the roof, namely, that part nearest  
 “ to the front house, to the west, so as to show in after  
 “ times that he had an undoubted right to the usual  
 “ drop along the whole length of his west wall.”

JACK  
 v.  
 LYALL.  
 1st April 1835.

Then let us see what was done. The petition is acceded to, and the parties are at issue before the liners on the boundary question. The liners report that, having visited and inspected the subject in dispute, they can form no judgment until a proof is allowed; and they recommend a proof and a competent land surveyor to be appointed. Then comes the petition of Mr. Lyall; and the conclusion that he arrives at is, “ that if this is persisted in, it may give rise to  
 “ other disputes; and as it would be advisable to have  
 “ every matter connected with the marches of parties  
 “ settled and defined, the present application is made  
 “ for that purpose.” Much that is relied upon rests on the boundary. I may have eavesdrop from my wall into my garden; that is property, not servitude: but if I have eavesdrop into your garden, that is servitude. If I claim eavesdrop along my boundary, the question is simply, what is my boundary? Then a proof is taken; the liners are appointed to examine the subject; and they report, “ that the said William Lyall has a right  
 “ to an eavesdrop along the whole of his west boundary,  
 “ northward from the back wall of the houses of parties  
 “ fronting the High Street.” They do not report of it, as they ought more correctly to have done, upon the lining; and that gives rise to the difficulty or obscurity, if there be any in this case. The bailie finds

JACK  
v.  
LYALL.  

---

1st April 1835.

according to the report of the liners ; and then there is an advocacy bringing the matter before the Court of Session, whence, I am sorry to say, it comes here, although I do not object to the parties trying it where they like. If you look to the articles 3, 4, 5, 6, of the condescence of William Lyall, you will see that he treats it as a boundary question, and not as a question of servitude. Servitude is, no doubt, mentioned in the first article, and again in the course of the proceedings ; but if it be said that Mr. Lyall has treated it as servitude, let us see how Mr. Jack treats it. At folio 3, there is this distinct and articulate averment on the part of Mr. Jack himself : “ That the pursuer formerly brought, “ and has in dependence in this Court, an action at his “ instance against the defender, relative to the march or “ marches in dispute here, and that it would have been “ perfectly regular and competent to have introduced “ into that action the conclusions of the present.” Now, that is his own argument. Then here is another passage : “ That he is entitled to sell the ground that be- “ longed to his predecessors and authors, because he “ bought it, and is infeft in it, and was and is entitled “ to build on the sites of the houses erected by them.” That refers to property, not to servitude. He claims the brick wall of five or six inches, as if he had built the wall himself. That, again, is not servitude. He says, in substance : “ To show you that I had a right to drop “ water there, I did more than drop water there ; for, “ thirty-five years ago, the person from whom I take my “ title actually built a brick wall ; and it is very hard “ that I cannot drop water in a place where I have a “ right to build a wall.” That is the point in dispute

and it is not denied on the other side; and I state this to show that it was not servitus, but dominium that was in question. Now there is this observation to be made: If I were to spell every word of Lord Medwyn's interlocutor, perhaps I might say there is one part of it not quite consistent with the rest, or distinct from the rest; but I pray your Lordships to consider what sort of a question you have now before you, and whether it is not one in which you ought to give some credit to the findings in the Court below, so unanimous, and so uniform, one after the other in succession. First, we have the bailie,—that is nothing, for he goes with the liners; but I place very great reliance upon the authority of the liners in a question of this sort, where we have not seen the witnesses examined. Neither indeed did the Court of Session, and probably the liners did not see them. But then the liners are themselves persons of skill and experience; it is their office to attend to controversies of this sort, and they are as good as witnesses themselves. It is as if one half of a jury had had a view of the premises, and the rest of the jury, their fellows in the box, upon a doubtful matter which was left in suspense upon the evidence of the witnesses examined before the Court and jury, had said to the view-jury, "You have had a view, what say you upon this subject?" There are so many things that cannot be told by witnesses,—so many things where a man's impression, on seeing the spot, is decisive—that the liners are as good as witnesses. I therefore consider it as a question peculiarly fitted for such a tribunal, and that the evidence taken before them justified the finding of the Lord Ordinary. I cannot, for myself, see that there is any matter of law for us to discuss; but ad-

JACK  
v.  
LYALL.

1st April 1835.

JACK  
v.  
LYALL.  
—  
1st April 1835.

mitting there were, if we could discover whether they had come to a sound conclusion from the facts, it being a case such as I have described, no doubt is left that the Court below came to a sound conclusion, and I shall move your Lordships to that effect. The parties had a perfect right to go before a court of liners; if they were not satisfied with them, to proceed to the Court of Session, and thereafter to this House. I am sorry they have thought it worth their while to come here; but as they have put this estimate upon their right, it is very fit that they should pay for having gone through all this litigation, and that, in the last instance, they should pay for coming here. There are fifty-two folio pages printed upon the right of eavesdrop, which was decided by the liners, by the bailie, by the Lord Ordinary, and by the Court of Session; then there are two actions; there is the advocacy,—a proceeding itself in the nature of appeal; then there is an action declaratory of the right as to the boundary,—that appears not to be a question of freedom from servitude. All this litigation has led to fifty odd folios on one side, and several folios on the other, containing a proof that lasted fourteen days, and in which seventy witnesses were examined; and as it is quite clear that we have no right to look into it, and are excluded from doing so by the act of the 6th of George the Fourth, all these circumstances lead me to advise your Lordships to affirm the decision of the Court below. The costs will be certified by the clerk-assistant, and be made part of the final finding.

It was accordingly ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, “That  
“ the said petition and appeal be, and is hereby dismissed

“ this House, and that the interlocutors, so far as therein  
“ complained of, be, and the same are hereby affirmed: And  
“ it is further ordered, That the appellant do pay or cause to  
“ be paid to the said respondent the costs incurred in  
“ respect of the said appeal, the amount thereof to be certi-  
“ fied by the clerk-assistant.”

JACK  
v.  
LYALL.  
—  
1st April 1835.

ANDREW M. M'CRAE—ALLISTON, SMITH, LOCK, and  
ALLISTON,—Solicitors.

[8th April 1835.]

**WILLIAM TAYLOR**, for himself, and as trustee of his wife  
**Mrs. ELIZA FLETCHER TAYLOR**; and she with concurrence of her curator ad litem, Appellants.—*Shand*.

**JAMES KERR**, trustee on William Taylor's sequestrated estate, Respondent.—*Keay*.

*Bankruptcy—Sequestration.* 1. Circumstances under which a transaction entered into by creditors on a sequestrated estate, for taking a lease of part of a coal field adjacent to and forming part of a coal field belonging to the bankrupt, with a view to the beneficial working of the coal, was, in a question with the bankrupt and his wife as a contingent creditor, sustained.

2. Where a question as to compromising claims on a sequestrated estate, and counter claims by the bankrupt by executing mutual discharges, had been repeatedly under consideration of meetings of creditors, and the matter was adjourned for further consideration, an objection by the bankrupt and his wife to a resolution of a meeting of the creditors to enter into the compromise, that the advertisement did not specially bear that the meeting was called for this purpose, repelled.

**1ST DIVISION.** **BY** marriage contract in 1814, between William Taylor, then of Nethermain, and Miss Eliza Fletcher, he became bound, in the event of her survivance, to pay to her 1,000*l.* a year, and to secure certain sums for the children of the marriage. In security of these provisions, he conveyed his estate of Nethermain, under a reservation of his own life, to himself, his wife, and the late Mr. Miles Angus Fletcher advocate, her brother, as



trustees, with a claim of absolute warrandice, and an obligation to free and disencumber the estate of Nether-  
mains to the extent of 7,500*l.* within three years. The  
trustees were infest in Nethermains, but the obligation  
to disencumber the estate was never complied with, and  
it was sold for payment of the encumbrances at a price  
only about equal to their amount.

TAYLOR  
v.  
KERR.  
8th April 1835.

At this time Mr. Taylor was in possession of a lease of the Bartonholm colliery in Ayrshire, of which the period of expiry was in 1835, the rent being payable by a fixed money rent, or, in the option of the landlord, a lordship on the coal raised; and it was provided that, in the event of the coal becoming unworkable to profit, the lease should then be at an end. A power to subset was granted, but assignations were specially prohibited. The coal consisted of two distinct seams—the one called the parrot seam, and the other the five-quarter seam; the former was the most valuable of the two; inso-  
much that the latter, or five-quarter seam, was by itself not saleable, and had never been brought to market without a certain proportion of the parrot seam mixed with it. Adjacent to the parrot seam there was a small field of coal belonging to Lord Eglinton, which was a continuation of the parrot seam, and was supposed to extend to about two or three acres.

In 1816 Mr. Taylor became bankrupt; and he then conveyed his property and effects by a deed of trust in favour of John Neilson and John Fulton, engine-makers in Glasgow, with general powers of management, sale, and distribution among his creditors. This trust was superseded in February 1819, by a sequestration under the bankrupt statute awarded by the Court of Session, which met with the most determined opposition from

TAYLOR

v.

KERR.

8th April 1835.

Mr. Taylor. In May of the same year he presented a petition to the Court, praying for its recall, but the petition was refused, and the judgment was affirmed by the House of Lords on 26th May 1822.<sup>1</sup> Pending the appeal, the respondent, Mr. Kerr, had been elected and confirmed trustee, and he presented a petition to the Court, praying for authority to call meetings for choosing commissioners and taking other steps prescribed by the bankrupt act in the meantime, until the appeal should be discussed. This petition was also resisted by Mr. Taylor, but the Court granted the prayer of it; against which judgment Mr. Taylor presented a second appeal, which was also dismissed on 9th March 1824.<sup>2</sup> The respondent in the meanwhile had obtained a warrant from the Court, ordering Mr. Taylor to appear for examination on certain days; against which order he also entered an appeal, but it was likewise dismissed on 2d March 1825.<sup>3</sup>

Mr. Taylor was examined in 1831, and took the statutory oath; in the meanwhile a claim had been lodged on the sequestration by the marriage trustees, for 20,000*l.* on behalf of Mrs. Taylor, in respect of her contingent provision of 1,000*l.* per annum. Certain complicated transactions had taken place between Mr. Taylor and his brothers John and George, and it was uncertain in whose favour the balance stood; he was also indebted to his sister Mrs. Maxwell Gordon and her family, but he alleged that he had counter-claims.

In the month of May 1829, the respondent laid before the creditors a report upon the general state of the affairs,

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<sup>1</sup> 1 Shaw's Appeal Cases, p. 254.

<sup>2</sup> 2 Shaw's Appeal Cases, p. 30.

<sup>3</sup> 1 Wilson & Shaw, p. 30.

exhibiting, in particular, a view of the mutual claims  
 between Mr. Taylor and his relations, and a suggestion  
 was made that they should be settled by a compromise,  
 on the basis that both parties should agree to extinguish  
 at once all claim on either side by a general discharge.  
 A motion was then made by Mr. Miles Fletcher on be-  
 half of his sister, Mrs. Taylor,—“ That, in order to  
 “ satisfy the creditors and the friends of Mrs. Taylor,  
 “ whether it be expedient to enter into the proposed  
 “ mutual discharges between the trustee and Mr. George  
 “ Taylor, the consideration of this part of the report be  
 “ adjourned till a meeting to be held on Wednesday  
 “ the 26th day of August next; the meeting to instruct  
 “ Mr. Kerr to transmit to Mr. William Taylor copies  
 “ of the accounts rendered by Mr. George Taylor, and  
 “ particularly referred to in the report, a copy of which  
 “ will also be transmitted. Mr. Kerr will accompany  
 “ these papers with an earnest request on the part of  
 “ the creditors, that Mr. Taylor should furnish him with  
 “ a full statement of the objections which he has to the  
 “ accounts, and also a detail of his counter-claims.  
 “ Mr. Kerr will call the particular attention of Mr. Tay-  
 “ lor to the deed of agreement between himself and his  
 “ brothers in 1814, and require Mr. Taylor to show the  
 “ amount of his claim against his brothers, arising out  
 “ of that transaction;—which motion being seconded by  
 “ Mr. King is unanimously agreed to, and the trustee  
 “ is instructed accordingly; and the meeting add, that  
 “ they trust the trustee will send off his communication  
 “ to Mr. Taylor with as little delay as possible.” The  
 respondent made these communications as directed, and  
 he framed a new report, which was taken into considera-  
 tion at the adjourned meeting held on 26th August 1829;

TAYLOR  
 v.  
 KERR

8th April 1835.

TAYLOR  
v.  
KERR.  
8th April 1835.

and the creditors then resolved “to be regulated by the  
“ opinion of counsel as to the proper construction of a  
“ certain deed of agreement, and if that opinion should be  
“ adverse to the creditors, then the compromise for a  
“ mutual discharge of all claims should be entered into,  
“ it being understood that the discharge to be granted  
“ by the trustee on this estate will bear, that he does  
“ not interfere with the claims of the trustees under the  
“ contract of marriage of Mr. and Mrs. Taylor in any  
“ respect.”

Against this resolution a petition and complaint to the Court of Session was presented in the name of Mrs. Taylor, and was superseded for some time. In the meantime the opinion of counsel was taken, and was unfavourable to the creditors.

The respondent on entering on his duties as trustee, being unable to dispose of the lease of the Bartonholm colliery, proceeded, with the sanction of the creditors, to work the coal, which, in so far as regarded the parrot seam, was said to have been highly beneficial to the estate; but that seam becoming nearly exhausted, the respondent, on the 30th August 1833, entered into a preliminary memorandum of agreement with the factor of Lord Eglinton for a lease of that part of the parrot coal seam which extended into the lands of Snodgrass, forming part of the Eglinton property, during the currency of the Bartonholm lease; and he also made an arrangement with the proprietor of Bartonholm, by which the latter agreed that the coal might be worked and brought up by means of the pits on his estate, but “under the following conditions and  
“ reservations:—1st, That if under any circumstances  
“ the lease of Bartonholm colliery should during the

“ currency thereof devolve on William Taylor the  
 “ bankrupt, that in such event this consent shall eo ipso  
 “ become void and null; and, 2dly, That it shall not  
 “ be in your power, nor that of any other individual  
 “ now, or who may hereafter be connected with the said  
 “ lease of Bartonholm, or who may claim any privilege  
 “ under this missive, to cut through the dyke or stone  
 “ barrier understood to run through the Snodgrass coal  
 “ field, and to be the means of preventing the water  
 “ supposed to be in the Misk workings to the west and  
 “ south-west from finding their way into the Bartonholm  
 “ workings; on the contrary, that if said dyke or stone  
 “ barrier shall at any time hereafter be cut through by  
 “ you, that this permission shall not only become void,  
 “ but, at the same time, that it will be in my power to  
 “ adopt all competent legal measures for redress, and  
 “ for recovery of damage which may be established to  
 “ be sustained by your cutting through said dyke; but  
 “ this condition is not to prevent you from working up  
 “ to the said dyke and along it. Further, it is to be  
 “ understood that you join me in boring at and from  
 “ the bottom of the workings of the present parrot seam,  
 “ to such a depth, not exceeding fifty fathoms, as may  
 “ ascertain whether what is called the main coal in that  
 “ district of country exists in Bartonholm field; said  
 “ boring to be under the immediate direction of  
 “ Mr. Dodd, your coal manager, and the expence to be  
 “ mutually defrayed, that is, one half by me, and the  
 “ other half by you. In conclusion, I acknowledge  
 “ having seen your memorandum of agreement with  
 “ Lord Eglinton’s factor, subscribed in initials by you  
 “ and Mr. Johnston, and that the present consent is  
 “ given in reference thereto.”

TAYLOR  
 v.  
 KERR.

8th April 1835.

TAYLOR  
v.  
KERR.  
—  
8th April 1895.

In October thereafter the respondent published this advertisement in the Gazette:—" The trustee requests  
" the creditors of Mr. Taylor to attend an adjourned  
" general meeting in the trustee's office, No. 11, Miller  
" Street, Glasgow, on Monday the 22d day of October  
" instant, at twelve o'clock noon, to consider a proposal  
" for a lease of coal, to be wrought in the lands of  
" Snodgrass, adjoining the Bartonholm coal workings,  
" by the creditors of Mr. Taylor, and by the present  
" machinery at Bartonholm; and, if considered advan-  
" tageous for the creditors, to authorize the trustee and  
" commissioners to enter into the proposed lease; also  
" said meeting of creditors to instruct the trustee gene-  
" rally upon the affairs of the estate."

At this meeting, (which was attended by Mr. Taylor as trustee under the marriage contract, and by a Mr. Lamond for Mrs. Taylor individually,) the transaction with Lord Eglinton was made the subject of the following motion:—" And the said proposal for a lease  
" of the coal belonging to Lord Eglinton, as set forth  
" in a memorandum initialed by Lord Eglinton's factor,  
" and Mr. Kerr, the trustee on this estate, of date the  
" 30th day of August last, having been taken up and  
" discussed at great length, as also the minute of con-  
" sent by the landlord of Bartonholm also produced to  
" this meeting, Mr. Gibb motioned, that the trustee  
" and commissioners on this estate be instructed to enter  
" into said bargain and transaction for working said coal  
" belonging to Lord Eglinton, in the terms expressed  
" in the said memorandum, and in the minute of the  
" landlord of Bartonholm; which motion was seconded  
" by Mr. Montgomery, mandatory of Mr. Burns.  
" Whereupon the said Robert Lamond protested against

“ the preses putting the said motion to the vote, in  
 “ respect of its being incompetent for a meeting of the  
 “ creditors to authorize the entering into a lease for the  
 “ working of new coal ; and further protested, whatever  
 “ result the meeting might come to, his constituent and  
 “ the absent creditors shall not be held bound by any  
 “ contract that may be entered into ; but the creditors  
 “ who sanction the same shall do so on their own indi-  
 “ vidual responsibility, and that they shall relieve the  
 “ others of all expences that may be thereby occasioned.”  
 Further, “ Mr. Archibald Young, as mandatory of the  
 “ Kilmarnock Foundery Company, protested in the  
 “ name of his said constituents, and for all others who  
 “ might adhere thereto, against said motion being put  
 “ to the vote, as ultra vires of the trustee and creditors,  
 “ and inexpedient ; and that they should not in any  
 “ manner be held bound by any consequences which  
 “ might follow said motion being carried, but should be  
 “ free therefrom ; and that they should not be liable in  
 “ any expence which might follow from said motion  
 “ being carried ; but that the trustee and creditors  
 “ acceding to said motion shall be obliged to free and  
 “ relieve them of all such consequences and expences.

“ To both of which protests against putting the  
 “ motion the said William Taylor adhered.”

The subject of the mutual discharges was then made  
 the subject of the following motion :—“ Thereafter  
 “ Mr. John Taylor Gordon motioned, that this meeting  
 “ shall come to the following resolution, viz., ‘ That  
 “ ‘ having considered the former reports of the trustee,  
 “ ‘ the resolutions of the creditors, and the late reports  
 “ ‘ of the committee of creditors, all in regard to the  
 “ ‘ proposed mutual discharges betwixt William Taylor

TAYLOR

v.

KERR.

8th April 1835.

TAYLOR  
v.  
KERR.  
8th April 1835.

“ ‘ the bankrupt, represented by his trustee on the one  
“ ‘ part, and, on the other part, the partners or repre-  
“ ‘ sentatives of the partners of John Taylor and Sons;  
“ ‘ also the representatives of John Taylor, the father  
“ ‘ of the bankrupt, and of John Taylor of Blackhouse,  
“ ‘ his brother; also Mrs. Gordon his sister, and her  
“ ‘ family; also Mr. George Taylor, for all and sundry  
“ ‘ claims of every description for and against each  
“ ‘ other,—this meeting, without prejudice to the former  
“ ‘ resolutions approving of said mutual discharges at a  
“ ‘ meeting of creditors held on the 26th day of August  
“ ‘ 1829, not only corroborate the same, but do now agree  
“ ‘ to the same, and authorize and instruct the trustee  
“ ‘ to carry deeds to that end into effect: farther, in re-  
“ ‘ gard that Mrs. Taylor’s petition against the said reso-  
“ ‘ lutions is still in dependence, authorize and instruct  
“ ‘ the trustee to bring it to an immediate close.’ Which  
“ motion was seconded by Mr. Archibald Kenneth.

“ Which motion having been put, after the subject  
“ was fully discussed, the following creditors or manda-  
“ tories for creditors voted for it, subject to the con-  
“ ditions expressed in the minute of the meeting of  
“ creditors held on the 26th August 1829; viz., that the  
“ counter mutual discharge shall include a discharge of  
“ the arrear of rent for Fairlie coal and Peatland farm,  
“ prosecuted for by Sir William Cunninghame, and  
“ arrear of the rent of Doura farm and coal, claimed by  
“ Sir James Cunninghame; and also under this addi-  
“ tional condition, that said counter discharge shall  
“ include a discharge by Mrs. Burnett, claiming to have  
“ right to a large sum of arrears for the Dalhousie  
“ colliery, as set forth in her claim and affidavit of date  
“ the 10th day of August last, lodged with the trustee;



“ that is, said motion was agreed to under these con-  
 “ ditions by Mr. James Dunlop, John Neilson, Anthony  
 “ Dodds, John Fulton, James Gibb, William Young, Mathew Montgomerie, and the said John Taylor  
 “ Gordon, and opposed by the said Robert Lamond  
 “ and the said William Taylor, who severally protested  
 “ against the validity of the votes given for the motion;  
 “ whereupon Mr. Gibb of new protested against the  
 “ validity of the votes of the said Robert Lamond and  
 “ William Taylor.

TAYLOR  
 &  
 KERR.

8th April 1835.

“ The preses now declares, that said motion, seconded  
 “ as aforesaid, and subject to said condition, is carried  
 “ by a majority.”

Against these resolutions a petition and complaint was presented to the Court of Session at the instance of Mr. Taylor and his wife, praying the Court to declare the same void and null, or to recall them as inexpedient, and to prohibit the trustee from acting upon them; and to remit to him, with instructions to cause full and sufficient inquiry to be made into his claims proposed to be included in the general discharge; and thereafter to take proper measures for making the same available to the estate.

The petition and complaint which had been presented against the resolutions to enter into the compromise, if the opinion of counsel should be adverse to the creditors, was now resumed, and was advised along with the second petition. The Court, on the 17th January 1833, by separate interlocutors, dismissed both of the petitions.<sup>1</sup>

Mr. and Mrs. Taylor appealed.<sup>2</sup>

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<sup>1</sup> 11 S., D., & B., 250.

<sup>2</sup> No appeal was entered against the judgment dismissing the first petition.

TAYLOR

v.

KERR.

8th April 1895.

*Appellants.*—1. The resolution to enter into a new lease of a different subject, for behoof of and at the risk of the creditors ranked on the estate, was under any circumstances incompetent, and ultra vires of the meeting. The main object of the bankrupt statute is to realize and distribute, as quickly as is consistent with the interest of creditors, the funds of the bankrupt, such as they are.<sup>1</sup> The whole tenor and spirit of the act obviously is, that sequestrations shall be brought to a close within a few years at the utmost, and that no delay in realizing and distributing the funds shall be permitted, except under circumstances where that delay is unavoidable. But more particularly is it adverse to the spirit and intention of that statute to allow the trustee, or the majority of creditors, to convert the sequestration into a mercantile adventure, and to employ the funds of the estate as a means of speculation, even were the chance of profit very considerable and the risk exceedingly small. Its object is to wind up old concerns, not to embark in new ; nor within the whole scope of the statute is there any thing to countenance the idea, that a majority of the creditors have it in their power to enter upon new contracts of lease, and compel the minority, however small, to enter upon a joint stock speculation in an agricultural, manufacturing, or mining lease, as the case may be. This case must be settled on general principles which will apply to all sequestrations, and not on any adventitious circumstance, such as that of the comparative value of the majority and minority, or the comparative risk of the contract to be undertaken.

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<sup>1</sup> Sect. 41 and 75 ; 2 Bell, 726.

Looking to the object and intent of the bankrupt statute, which, instead of prolonging sequestrations indefinitely, contemplates their termination as speedily as possible, and gives the most express directions for that purpose, the rule must be, that no majority of creditors shall have it in their power to hang up the sequestration,—to hazard the funds of the sequestrated estate, in which all the creditors have an interest, and even to subject the objecting creditors to personal responsibility by embarking in new contracts, which, if on the one hand they may turn out to be advantageous, are, on the other, undeniably subject to hazards, the extent of which cannot possibly be foreseen. Whatever may be the nature of the contract the case is truly the same, provided it be a new contract and entered into with the view of speculation. A lease of a farm may be attended with less risk than that of a colliery; a speculation in railway shares may be more precarious than either; these are matters of opinion, as to which no rule can be laid down beforehand; but all are objectionable, not because they are more or less hazardous, but because all of them are opposed to the true intent of a sequestration, which is simply a process of distribution; they are all attended with risk, and are calculated to divert the funds of the bankrupt from their legitimate purpose into a channel of mere speculation and adventure, in which the minority are compelled, whether they will or no, to become partners. It is true that there may be cases in which it would be most injurious to creditors to bring the sequestration to an immediate termination; and where the trustee may even continue to conduct contracts entered into by the bankrupt for years, and

TAYLOR

v.

KERR.

8th April 1835.

TAYLOR  
v.  
KERR.  
8th April 1835.

where his doing so may subject the sequestrated fund or the creditors to some risk. But these cases, so far from being inconsistent with the general principle, that the trustee is not to embark the creditors in new contracts, only show more strongly the reason and principle of the rule. Take the case of a lease of a farm prohibiting assignees, or of extensive manufacturing concerns, of which several years are current at the date of the sequestration. If the trustee cannot dispose of the leases, the funds of the bankrupt must continue liable for the rent during the currency of the contract; and, therefore, there must either be an immediate and certain loss to the estate, by abandoning the contracts and paying damages or rents, or else the trustee and creditors must go on to make the most of the leases for the remainder of the period, though there may be some risk to the estate from their doing so. To prevent a certain and immediate loss to the estate, the risk of some contingent loss must be run; but that exception arises out of and is limited by the necessity of the case. The trustee and creditors go on with the contracts, making such purchases as may be required for carrying them on, only because they cannot avoid it without ruin to the estate.<sup>1</sup> Such was the nature of the cases of Reid, 25th May 1830<sup>2</sup>; of Wilson, 17th May 1822<sup>3</sup>; and of Bland, 11th January 1825.<sup>4</sup> But here the trustee and creditors had it in their power to throw up the old lease the moment they could show that the coal was no longer workable to profit; and it is ad-

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<sup>1</sup> 2 Bell, 412.

<sup>2</sup> 8 S., D., & B., 793.

<sup>3</sup> 1 S. & D., 417, old edition; 389, new edition.

<sup>4</sup> 3 S. & D., 419, old edition; 294, new edition.

mitted that when they chose to enter into this new lease of the Snodgrass field with Lord Eglinton, the coal in Bartonholm was almost worked out, and was no longer workable to profit. That was the very basis on which the proposal for the new lease was recommended to the creditors; there was, therefore, no necessity whatever for entering on any new lease of coal in order to keep the machinery of Bartonholm still on the ground and employed. If there remained coal in Bartonholm sufficient to employ the machinery, then there was no need of taking a new field; if there remained no coal which could be worked to profit, they had only to get this ascertained by a proper survey, and the lease was at an end. The machinery could then have been brought to sale, and that would then have been done to far greater advantage than is likely to be the case in 1835, when, after all, it must be brought to sale for behoof of the creditors.

But even, if under peculiar circumstances a trustee and majority of creditors under a sequestration can enter upon a new contract, their doing so in this case was peculiarly inexpedient and improper. Of all contracts, coal leases are the most speculative and hazardous, both from the absolute impossibility of foreseeing beforehand either the extent or quality of the field, or the risks to which, from local circumstances, the workings are to be exposed. But there are special hazards attending the speculation in question still more formidable; the acceptance of the offer of the proprietor of Bartonholm proceeds upon two conditions:—he stipulates, in the first place, that it shall not be in the power of the trustee to cut through the dyke or stone barrier understood to run through the Snodgrass coal field; and if so cut down, he stipulates for a reservation of his right to claim

TAYLOR

v.  
KERR.

8th April 1835.

TAYLOR  
v.  
KERR.  
8th April 1835.

damages; and secondly, he stipulates that a boring shall take place at the joint expence of himself and the trustee, to the depth of fifty fathoms, with a view to discover whether a particular species of coal may be found in the collieries. The dangers arising from these contingencies have been demonstrated in the most conclusive manner by the total destruction of the Bartonholm colliery itself, from an accident which, though not foreseen, only shows the more strongly the very extensive and multiplied hazards to which these speculations are exposed. The main recommendation to the creditors to take the Snodgrass field was, that the coal could be worked and raised through the Bartonholm pits, and without removing the machinery from its present position; but, in consequence, (as is stated by the trustee,) of the improper workings of Lord Eglinton's colliery, an irruption of the river Garnock into that colliery took place, from which it penetrated into and totally filled and rendered useless the workings of Bartonholm. The machinery, therefore, and the pits by which it was proposed to work the Snodgrass coal, are now totally useless; and the very first step which would now require to be taken would be to put on additional engines, at a large expence, to drain the colliery before the works were commenced. The very inductive cause, therefore, of the new undertaking is gone; for the expence of the preliminary step of clearing the Bartonholm waste would in itself be enormous.

2. The resolution by which it was resolved to compromise the claims of the appellant upon the footing of mutual discharges was null and void, in respect the meeting at which said resolution was put and carried was not duly called by advertisement in terms of the

statute. By sect. 41 of the statute, as to occasional meetings, it is provided that the trustee shall, "if required at any time by one fourth of the creditors in value, who have produced and proved their claims, be obliged to call a general meeting, or he may himself, on any emergency, call such meetings, sufficient previous intimation of every occasional meeting, and the purpose of calling it, being always given by advertisement in the Edinburgh Gazette and London Gazette a fortnight at least before the meeting."

TAYLOR

v.

KERR.

8th April 1835.

On this provision Mr. Bell<sup>1</sup> observes, that "the power given to meetings called for the purpose of regulating any part of the management can be effectually exercised only if the creditors shall be made aware, in the advertisement, of the purpose of the meeting. This is implied in the expression, 'called for the purpose.' " But the advertisement calling the meeting, though it specially called the attention of the creditors to the proposed new lease of the Snodgrass coal, was totally silent as to the important matter of the compromise of the whole claims of the bankrupt against his brothers. The words, "and to instruct the trustee generally as to the management of the estate," could never make the creditors aware that so important a step as this was about to be discussed and decided on at that meeting; and coupled as it was with the special enumeration of one subject of discussion, namely, the proposal for the lease, it was in the highest degree calculated to mislead.

In the Court below the respondent attempted to evade the merits of the points at issue, by pleading that

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<sup>1</sup> 2 Bell, 726.

TAYLOR  
v.  
KERR.

8th April 1895.

the appellants had no lawful title to complain. It was assumed that the complaint was by the bankrupt, whereas in fact he appeared and acted exclusively as the trustee under the marriage contract, and therefore no objection could be made to his title. Then it was alleged that his wife was merely a contingent creditor, and it was said she had no lawful title to interfere with the management of the estate in opposition to the great body of the creditors. But although a contingent creditor does not possess all the rights of an absolute creditor, he is undoubtedly entitled to interpose so as to prevent any thing being done which may be injurious to the estate out of which payment is contingently to be made.

*Respondent.*—1. The appellants have no legal title to oppose the resolutions, or to sue and insist in the petition and complaint. The present is the first instance which the records of the Court exhibit, of any attempt by a bankrupt, in the shape of legal proceedings, to disturb or resist his creditors in the measures which they deem necessary for realizing the trust property in payment of their debts. The only case in which it has ever been maintained that the bankrupt has a title to sue, or appear in any matter connected with the estate, is that of the dereliction or abandonment of claims by the creditors; but even in that situation, the party against whom the proceedings are directed is held entitled to insist in limine that the bankrupt shall find security for expences.<sup>1</sup> The present is not the case of an abandonment of a debt; it is the case of an act of management for the beneficial administration of the estate; and in regard to the discharge it is

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<sup>1</sup> 2 Bell, 461.



the compromise of a debt in consideration of a discharge by the other party of counter-claims, and consequently comes within the operation of the rule laid down by Mr. Bell,—“ If they (the creditors) compound or com-  
“ promise the claim, he (the bankrupt) must submit.”

TAYLOR  
v.  
KERR.

8th April 1835.


Again, the title of the bankrupt's wife is equally objectionable. Her appearance is founded on the eventual provisions stipulated in her contract of marriage, at the date of which the bankrupt was in a state of utter insolvency, so as to render any such provisions totally nugatory and unavailing. But, at all events, these provisions are in their own nature uncertain and contingent, depending entirely on the wife's chance of survivance, and therefore not furnishing an interest sufficient to qualify her to vote at, nor by consequence to give her a legal title to challenge the proceedings of meetings. By section 24 of the bankrupt act it is enacted,—“ That no  
“ person, whose claim upon the bankrupt estate is merely  
“ contingent, or depending upon an uncertain condition,  
“ shall be entitled either to join in the petition above  
“ mentioned for sequestration, or to vote in the choice  
“ of factor or trustee, or in the other steps of proceeding  
“ herein specified;” agreeably to which Mr. Bell lays it down, that “ no contingent creditor can vote for  
“ interim factor;” and again, as to the election of trustee, “ a contingent creditor cannot vote.” And therefore, as a contingent creditor has no voice in the deliberations of the creditors as to the appointment of their managers, it is a necessary consequence that such a creditor can have no legal title under the statute to challenge the result of their deliberations as to the management.

But even if they had a title to complain, there are no just or legal grounds for their complaint; and the

TAYLOR  
v.  
KERR.  
8th April 1835.

measures adopted by the creditors were wise, prudent, and beneficial for their interest, and formed the only safe or expedient course that could be followed under the circumstances. The lease could not be assigned, because assignments were prohibited; and although the parrot seam of coal was nearly exhausted, yet the other was not, and the adjoining coal belonging to Lord Eglinton, being a continuation of the parrot seam, not only afforded a lucrative subject of itself, but the profitable means of pushing off the produce of the five-quarter seam, and keeping the present machinery employed to the end of the lease of Bartonholm. The advantages of the transaction with Lord Eglinton have been estimated as amounting to not less than from 1,200*l.* or 1,600*l.* per annum until the end of the lease in 1835.

There is nothing in the spirit or letter of the bankrupt statute in the slightest degree inimical to such a transaction. It may be true, as a general observation, that the creditors, as a body, ought not to embark in mercantile adventures, or run the hazard of mere speculations, under whatever temptation of seeming profit. But nothing is more common than for a body of creditors to carry on the business of the bankrupt for a time, where they think it for their advantage to do so. Valuable subjects may be thus gained or secured to the trust estate; machinery may be kept going; and where there is a great deal of raw material on hand, it may be wrought up, and most advantageously sold. In all such cases where profit is to be gained, or great loss to be avoided by a temporary continuance of the bankrupt's business, such a course is quite common among creditors, who are the best judges of the circumstances under which it may be advisable, and of the proper limits



within which it should be restrained, and accordingly the Court have uniformly refused to interfere with creditors in such matters.<sup>1</sup> It is true that the transaction is subject to the conditions which the proprietor of Bartonholm attached to his consent, which are the price or consideration for which that consent is given; but they are in themselves fair and reasonable, and in no respect prejudicial to the trust estate. The first of these is, that the creditors shall join in boring to the extent of fifty fathoms in search of the main coal, and the whole expence has not only been estimated, but the work offered to be contracted for by a most respectable tradesman for 75*l.*, one half of which would be the proportion payable by the creditors. But even against this expence there is to be set off an advantage of the most material kind, regarding the machinery, which, by the present lease, the landlord, though he has an option, is under no obligation to take at a valuation at the end of the lease. But by going on with the present agreement, the machinery will be in a state of activity and efficiency at the end of the lease; and the landlord, if either the main coal be discovered in Bartonholm, or if he can obtain a renewal of the agreement with Lord Eglinton, has then the strongest possible inducement to take the machinery at a valuation, which would be a saving to the creditors of not less than 1,000*l.*

By the other condition, the creditors are restrained from cutting the dyke or stratum of stone running through the Snodgrass field, and separating it from the Misk field, which is supposed to be overflowed with

TAYLOR  
v.  
KERR.

8th April 1835.

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<sup>1</sup> Reid, 25 May 1830, 8 Shaw, 793; 17 May 1822, 1 Shaw & Dunlop, 417 old edition, 389 new edition; 11 Jan. 1825, 3 Shaw, 419 old edition, 394 new edition.

TAYLOR  
v.  
KERR.  

---

8th April 1835.

water. That there exists such a stratum or natural barrier is a fact well known, and it is not to be supposed that the creditors or their managers will drive rashly forward with their operations until they run upon the dyke or barrier, or that these workings would not be carried on with due precaution, so as effectually to guard against any sudden irruption of water from deserted fields. Numerous most valuable coal fields are wrought under the known vicinity of great bodies of water, attended with circumstances of much nicety, and requiring the most careful combination of skill and vigilance to protect the workings; but in the present case the workings were not intended to have been carried farther forward than about 200 yards of the distance within which they had hitherto been conducted with perfect safety, and there was not even an apprehension of water on a level with the workings; while, on the other hand, those precautions were to be used which are known to be effectual even in the most difficult cases.

It is true (though the fact can have no relevant application to the present question,) that about six months after the judgments under review were pronounced, the works belonging to the estate were involved in the destruction brought upon several other works by a totally different cause, from which no danger was or could have been apprehended by any party concerned, viz. the sudden bursting in of the river Garnoch upon the neighbouring works of Snodgrass. This accident happened at the distance of from 400 to 500 yards from the nearest point of the Bartonholm workings carried on by the respondent, and was occasioned by the operations of other parties in pushing their workings from below so close upon the bed of the river Garnoch, that it suddenly burst

through and involved all the neighbouring works, including those of the respondent, in a common destruction.

TAYLOR  
v.  
KERR.

8th April 1835.

2. The objection that the advertisement contained no special intimation that the matter of the compromise was to be brought under consideration of the creditors, is a mere cavil; it is a subject which had been before the creditors for years past, having been considered by various general meetings, and referred to special committees. It was no new matter, but part of the general business of the estate, adjourned from previous general meetings specially advertised, and on which the trustee was fully warranted to demand the instructions of the creditors. Besides, Mrs. Taylor has taken no appeal against the judgment of the Court dismissing her petition and complaint against the resolution of the meeting of 26th August 1829. But the resolution, respecting this matter of the mutual discharges, was identically the same as those of the meeting now complained of. It is true that the former resolution was to depend on the opinion of counsel, which was to be taken upon the proper construction of the agreement; but in the event of the opinion proving unfavourable to the bankrupt's view of that question, the meeting resolved to agree to the proposal of the mutual discharges. Now, the opinion was against the construction of the agreement contended for by the bankrupt, and consequently the resolution approving of the settlement by mutual discharges took effect. The petition and complaint, therefore, presented by the bankrupt's wife against that resolution having been refused by a judgment, final and acquiesced in by her, she cannot now be permitted to advance the very same pleas which were repelled by that judgment.

TAYLOR  
v.  
KERR.

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Lord Brougham moved and the House of Lords pronounced this judgment:—

8th April 1835.

It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, “That the said petition  
“ and appeal, be, and is hereby dismissed this House, and that  
“ the interlocutors therein complained of, be, and the same  
“ are hereby affirmed.”

ANDREW M. M'CRAE — A. DOBIE, — Solicitors.

[9th April 1835.]

GEORGE JOHNSTON junior, Esquire, Appellant.

*S. A. Murray.*

THE EDINBURGH AND GLASGOW UNION CANAL  
COMPANY, Respondents.— *Keay—Bruce.*

*Proof.*—Parole proof to control the terms of a written agreement refused to be admitted.

Circumstances under which two defenders were held (affirming the judgment of the Court of Session) bound under an agreement with a pursuer in mutual relief of a claim of damages, although it was afterwards proved that neither party was the cause of the damage.

IN the year 1829 an action of damages was brought before the Court of Session at the instance of May Rogers, late cook to John Innes Esq. of Cowie, narrating, that on the 24th day of June of that year she was sent by Mr. Innes from his house at Portobello to his country residence at Ratho-hall, and she accordingly proceeded so far on her journey as Port Hopetoun, where she entered on board a passage-boat, the property of and employed by the Edinburgh and Glasgow Union Canal Company to convey passengers : that they proceeded up the canal till they came opposite to Redhall quarry, which was held in lease by the appellant Mr. Johnston, where the passage-boat was brought in contact with a boat belonging to Mr. Johnston, which was lying at the side of the canal without any person on board, and used by him for conveying stones from the quarry to Port

2D DIVISION.

Ld. Medwyn.

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

Hopetoun, &c., on board of which there was a crane, with which large stones are raised, and the boat loaded or unloaded by means of it : that this crane, through the gross neglect of Mr. Johnston, or those intrusted by him with the management of his boat, was left unfastened, and when the Canal Company's passage-boat was improperly brought into contact with it, the crane swung forcibly round and struck May Rogers, who was then standing upon the deck of the Canal Company's boat with several other passengers, so violent a blow, that it dislocated and separated her right shoulder from her breast-bone, and thereby severely and dangerously injured her person ; and she was, besides, materially hurt by several of the other passengers, who were also knocked down by a spent blow of the crane, though not much injured, falling upon her when she was lying on deck : that she was carried out of the canal passage-boat into a house, and a surgeon was immediately sent for, who put the dislocated joint into its place ; but the parts had been so much injured and fractured by the blow, that it would not remain united, and it was found necessary to remove her to her master's house at Portobello, where she was provided with proper medical attendance : that she had been informed by medical gentlemen of competent skill that there was a probability that she would not recover from the effects of the blow, and that at all events she was debilitated for life ; and all her prospects in life had been frustrated and rendered abortive, and she had been rendered unfit to provide for her daily sustenance. She further alleged, that she had sustained all these injuries through the culpable neglect, carelessness, or inattention on the part of the said Union Canal Company, or those employed and intrusted by them



with the management of the passage-boat, in so far as they ought and were bound by law, and in justice to the passengers, to have noticed that the crane of Mr. Johnston's boat was loose, and ought to have stopped their boat till the crane was fastened, or given timeous intimation to the passengers to keep out of the way, as they must have known the danger they were in, the neglect of which, on their part, was the cause of all the subsequent disasters that befel the said May Rogers as before stated, and rendered them responsible for the consequences, and for the damage she had sustained :—That, on the other hand, the said George Johnston, or those employed and intrusted by him with the management of his boats, were bound, when they leave their boats, to have both the cranes and the boats properly fastened and secured, so as to prevent danger from their being left otherwise ; and their culpable neglect of this precaution on the above occasion was, at least in part, the cause of the injury the said May Rogers has sustained : at all events, through the culpable neglect of the said Union Canal Company and the said George Johnston, or one or other of them, or those intrusted by them, she had suffered the great injury and loss before mentioned, and they were jointly liable to her in reparation and damages. She therefore concluded that the Canal Company and Mr. Johnston should be decerned jointly and severally to make payment to her of the sum of 500*l.* sterling in name of damages and reparation to her for the great injury she had sustained in having her breast-bone separated from her right shoulder, and thereby rendering her unfit to follow out her profession, or earning her subsistence, and for the other losses and personal injuries sustained or to be sustained by her in consequence of the culpable neglect of the

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

defenders, or those intrusted by them with the management of their boats, as before mentioned, besides 200*l.* of expences.

Both the Canal Company and Johnston brought actions of relief against each other, the former alleging,  
 “ That if any injury was sustained by the said May  
 “ Rogers in the way and manner described by her in  
 “ the summons before narrated, the same was oc-  
 “ casioned by the crane on board the boat of the said  
 “ George Johnston having been left loose, and for which  
 “ neglect he the said George Johnston is alone respon-  
 “ sible, and not the pursuers, who had no control or  
 “ management of his boat: That the said George  
 “ Johnston is therefore bound to defend, free, and  
 “ relieve the pursuers against the aforesaid action of  
 “ damages at the instance of the said May Rogers in  
 “ manner after mentioned;” “and therefore the said  
 “ George Johnston ought and should be decerned and  
 “ ordained, by decree of our said Lords of Council and  
 “ Session, at his own expence to defend the pursuers  
 “ against the said action at the instance of the said May  
 “ Rogers, and to free and relieve them of the whole  
 “ conclusions and consequences thereof:—or otherwise,  
 “ the said George Johnston ought and should be de-  
 “ cerned and ordained, by decree foresaid, to make  
 “ payment to the pursuers of the said sum of 500*l.* of  
 “ damages, and 200*l.* of expences, concluded for by the  
 “ said May Rogers, or in so much thereof as the said  
 “ pursuers may be found liable in to the said May  
 “ Rogers in the course of the said process; as also of  
 “ 100*l.*, or such other sum, less or more, as the amount  
 “ of the expences which the pursuers have already  
 “ expended, or may expend, in defending themselves

“ against the aforesaid process;” besides the expences of their own action.

Johnston on the other hand alleged in his summons, “ That even though the very exaggerated account  
“ of the injuries sustained by May Rogers contained  
“ in her summons before narrated be true, she has  
“ no claim for damages or reparation against the  
“ pursuer. The boat belonging to him was lying perfectly still and motionless in a part of the canal  
“ where he has a right to station, and where he has  
“ uniformly been in the habit of keeping her, when  
“ the passage-boat, in which the said May Rogers was,  
“ came into that neighbourhood; it was then broad  
“ day-light, and there was abundance of room for the  
“ said passage-boat to have passed the boat of the pursuer without coming in contact either with that boat  
“ or with the crane, or any other part of the machinery  
“ that may have been projected from it. No part of  
“ the crane was then projecting from the boat, beyond  
“ the side of which it never can at any time extend  
“ more than three feet; but that, by some negligence or  
“ awkwardness on the part of those who had charge of  
“ the passage-boat, she was brought into collision with  
“ the boat of the pursuer, whose crane, being thus  
“ loosened and set in motion, swung round so as to upset  
“ several persons in the passage-boat, and, among others,  
“ the said May Rogers; but there was no fault whatever on the part of the pursuer, or those having charge  
“ of his boat, either in having stationed or moored her  
“ in the place where she then was, or in having placed  
“ or left the crane in any unusual or dangerous position;  
“ the fault, if any, was wholly with those who directed  
“ the passage-boat.” He therefore concluded that the Company should be decreed and ordained “ to defend

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

—  
9th April 1835.

“ the pursuer against the said action at the instance of  
“ the said May Rogers, and to free and relieve him of  
“ the whole conclusions and consequences thereof;” or  
otherwise “ be decerned and ordained by decree foresaid  
“ to make payment to the pursuer of the said sum of  
“ 500*l.* of damages and 200*l.* of expences concluded for  
“ by the said May Rogers, or in so much thereof as the  
“ said pursuer may be found liable in to the said May  
“ Rogers in the course of the said process; as also of  
“ 100*l.* sterling, or such other sum, less or more, as the  
“ amount of the expences which the pursuer has already  
“ expended, or may expend, in defending himself against  
“ the foresaid process,” besides the expences of his  
action.

Both parties put in separate defences against May Rogers’ action; and an issue was framed with a view to a trial of the cause before a jury.

On the morning of the day of trial the respective counsel for the parties entered into an agreement of the following tenor:—“ We, the counsel for the parties in  
“ the action at the instance of May Rogers against the  
“ Union Canal Company, and George Johnston, tacks-  
“ man of Redhall quarry, agree to settle the case upon  
“ the following conditions:—1st, That the defenders  
“ shall make payment to the pursuer of 200*l.* sterling  
“ in name of damages, and for all other claims on the  
“ part of the said May Rogers against the said defenders;  
“ 2d, That the said defenders shall pay to the said May  
“ Rogers the expences of the action, taxed, as between  
“ party and party, by the auditor of Court; and 3d,  
“ That all questions of relief between the defenders shall  
“ be reserved entire.” In pursuance of this compromise, a decree was pronounced against the Canal Company and Johnston, conjunctly and severally, for 200*l.*

of damages, and for 100*l.* 14*s.* 5*d.* as the expences of process.

A dispute having arisen between the Company and Johnston as to the party who was to advance the money, Rogers raised diligence against them both, and the Company paid the amount. The Company then insisted in their action of relief against Johnston, and his action being conjoined with theirs a record was closed, and the following issue sent to a jury:—"It being  
 " admitted, that during the year 1829, the defender  
 " George Johnston was proprietor of a certain boat  
 " used for the purpose of conveying stones along the  
 " Union Canal, from Redhall quarry to the city of  
 " Edinburgh, and that the pursuers, the Union Canal  
 " Company, were, during the same period, proprietors  
 " of another boat for the purpose of conveying passen-  
 " gers along the said canal: it being also admitted, that  
 " one May Rogers was, on the 24th of June 1829, a  
 " passenger on board the said boat, the property of the  
 " pursuers, and on the said day sustained certain inju-  
 " ries, for which, on the 22d day of January 1831, she  
 " obtained decree, finding the pursuers and defender con-  
 " junctly and severally liable in the sum of 300*l.* 14*s.* 5*d.*  
 " as damages and expences on account of the said  
 " injury, and reserving all questions of relief; whether  
 " the said injury was caused by the fault, negligence, or  
 " want of skill of the defender George Johnston, or of  
 " any person or persons in his employment for whom  
 " he is responsible, or by the fault, negligence, or want  
 " of skill of the pursuers, the Union Canal Company,  
 " or of any person or persons in their employment for  
 " whom they are responsible."

The following verdict was returned by the jury:—

JOHNSTON  
 v.  
 EDINBURGH  
 AND  
 GLASGOW  
 UNION CANAL  
 COMPANY.

9th April 1835.

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

“ In respect of the matters proven before them, they  
“ find that the injury was not caused by the fault,  
“ negligence, or want of skill of the defender George  
“ Johnston, or of any person or persons in his employ-  
“ ment for whom he is responsible, nor by the fault,  
“ negligence, or want of skill of the Union Canal Com-  
“ pany, or of any person or persons in their employ-  
“ ment for whom they are responsible.”

The Court having applied the verdict, remitted the case to the Lord Ordinary.

Lord Medwyn thereupon (3d June 1832) pronounced this interlocutor:—“ The Lord Ordinary, in respect of  
“ the verdict of the jury, finds, in the mutual actions of  
“ relief that neither party has established a claim to  
“ total relief from the adverse party; but as they  
“ mutually agreed to transact the action of damages  
“ brought against them conjunctly and severally, by  
“ paying the 200*l.* with the expences incurred, the  
“ whole of which was paid in the mean time by the  
“ Union Canal Company, instead of being paid by both  
“ in equal proportions, till the mutual claims of relief  
“ were disposed of, finds the Canal Company entitled  
“ to repayment of one half of said sums; therefore  
“ decerns against the defender George Johnston junior  
“ for the sum of 150*l.* 7*s.* 2½*d.* sterling, being one half  
“ of the sums paid by them on the 7th day of February  
“ 1831 years, with interest from that date till payment;  
“ further finds the said defender liable in the expences  
“ incurred before the Lord Ordinary under the remit  
“ from the Court; allows an account thereof to be given  
“ in,” &c.

Against this interlocutor Johnston presented a reclaiming note to the Court.

· Thereafter the Court sisted process till a new summons should be brought on the part of the Glasgow Union Canal Company.

In consequence of this sist the Company raised a new summons libelling on the action at the instance of May Rogers on the above agreement, on the payment of the money by them and the verdict; and they concluded for repetition of one half of the sums paid by them.

· In defence against this action Johnston alleged that the minute of agreement was meant and understood by the present parties “ to form a contract “ between them on the one side, and May Rogers “ on the other, in order to compromise and settle her “ claim; but it was not meant or intended to regulate “ or ascertain any thing relative to their mutual rights “ of relief or liability in relief to each other, which “ rights, whatever they might be, were merely reserved. “ They did, however, enter into a bargain relative to their “ relief; but that bargain was verbally made, viz. That “ the Canal Company should satisfy May Rogers in the “ mean time, and rely on their action of relief for “ recovery of the money from Mr. Johnston. It was “ on the express condition allenarly that he was to pay “ nothing to Rogers, or nothing to the present pursuers, “ unless his liability should be established in that action “ of relief, that he gave his consent to his counsel to “ enter into the compromise with May Rogers.” He therefore pleaded that it was competent to prove, prout de jure, the conditions on which two defenders of a personal action may have agreed inter se to transact the action with the pursuer; and further that the parties to this case having agreed to settle the original action in which May Rogers was pursuer, on condition that the Company should pay the full sum agreed to be taken by

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

May Rogers for a discharge of the action, and should have relief to the extent only that they should recover in their action which had been previously raised; and nothing having been recovered in that action of relief, the present action was inconsistent with the contract of parties; and a judicial reservation could not decide what these rights were.

The allegations in point of fact were denied by the Company, and they pleaded that, according to the true construction of the agreement, the parties were to relieve each other to the extent of one half; and they maintained that it was incompetent to contradict the legal import of the written document by parole evidence.

This action having been conjoined with the other conjoined process, the Court, on 17th January 1834, pronounced the following judgment:—“ The Lords repel  
“ the defences pleaded by George Johnston, junior, to  
“ the second action at the instance of the Edinburgh and  
“ Glasgow Union Canal Company, and decern in terms  
“ of the conclusions of that action: Find the pursuers in  
“ that action entitled to the expences of process, and  
“ remit the account thereof, when lodged, to be taxed;  
“ and recall the Lord Ordinary’s interlocutor of June 5,  
“ 1832, in so far as relates to the expences of process prior  
“ to the commencement of the said second action.”<sup>1</sup>

Johnston appealed.

*Appellant.* — There is no principle or authority in the law of Scotland, which declares it incompetent for two defenders in a personal action to fix conclusively inter se, by a verbal bargain, the conditions on which they will

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<sup>1</sup> 12 S. D., & B., 304.



transact or settle the action with the pursuer, such as that the one defender shall pay more and the other less, or that the one shall pay the whole compounded sum, and that the other shall pay nothing, but shall merely hold the character of joint debtor to the pursuer, or surety for his associate.

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

If it be competent for parties defenders thus to adjust matters inter se by a verbal bargain, it must of necessity be competent to prove the fact or terms of the bargain by every form of legal evidence. No doubt the fact that two parties defenders have compounded an action by undertaking to pay a sum of money to the pursuer for a discharge may perhaps give rise to a presumption that they are liable equally, as in a question between themselves, for the compounded sum; but this is nothing more than a presumption, and the rule must have effect, —*præsumptio credit veritati*; the Court below therefore did wrong in refusing to admit evidence to establish the appellant's allegation. Besides, the presumption was in favour of the truth of his averment; for, as remarked by a learned judge, the appellant was bound by no contract with May Rogers; whereas the Canal Company, as common carriers, were bound to show that, with regard to them, the accident was the result of an act of God. Further, a public trial tended to discredit them as traders conveying passengers, by showing that the public could not safely use their passage-boats, while the appellant on the other hand loaded his boats with nothing but his own blocks of stone. It is also corroborative of the appellant's averment, that after the compromise the Canal Company actually paid the compounded sum to May Rogers. They no doubt took an assignment to the decree in her favour, but did not attempt to enforce it against the ap-

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

pellant; on the contrary, they proceeded with their action of relief. The Court below therefore ought to have either allowed the proof tendered, or assoilzied the appellant.

*Respondents.*—The appellant's averment of a verbal agreement is irrelevant, and the proof offered of it is incompetent, as the object is to control or modify the written agreement. Under that agreement the parties transacted with May Rogers as conjunctly and severally liable to her; they reserved inter se, not merely the questions of relief, or the actions of relief, which were in dependence between them at the date of that transaction, but all questions of relief, whether under depending suits or suits to be instituted, on whatever grounds the relief might be claimed, and whether to the extent of the whole sums paid to May Rogers, or for a part of them only. Yet the appellant now avers and offers to prove by parole, that there was a verbal condition attached to the written agreement, whereby it was understood and agreed, that unless he were subjected under the action of relief then in dependence at the instance of the respondents against him, he was to pay nothing to May Rogers, and nothing to the present respondents; but this is an attempt to control and narrow a concluded written agreement by parole proof of a verbal condition alleged to have been adjoined by the appellant to that agreement in his own favour. There is not the slightest reference to a depending action of relief in the agreement; it is not so limited; and the appellant does not pretend that the respondents afterwards agreed to limit the agreement; his averment is, that it was only on condition of that limitation that he authorized his counsel to enter into the compromise at all. The respondents cannot possibly

know what authority he gave to his counsel; any proof on that subject is clearly inadmissible; and if he be entitled to prove prout de jure verbal conditions inconsistent with the terms of a written agreement, and alleged to have been at the very time adjected to that agreement, then the reducing transactions of the kind to writing will not be a means of preventing disputes arising from the misapprehensions or wilful misunderstandings of men, but the commencement of strife only. But the rule of the law of Scotland is that a written contract cannot be disproved or controlled by parole.<sup>1</sup>

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

The allegation is however altogether unfounded, and the appellant's case is rested on averments which are either misrepresentations of the fact or inconsistent with the truth. It was not part of the agreement that the respondents should pay the full sum agreed to be taken by May Rogers for a discharge of her action; the parties were called as conjunctly and severally liable to May Rogers; and the first head of the contract with that person is, that "the defenders shall make payment  
" to the pursuer of 200*l.* in name of damages; second,  
" that the said defenders shall pay to the said May  
" Rogers the expences of the action." It was not the respondents alone who were to pay, but both parties; and though May Rogers was to receive the money, still the conditions of the agreement were not in her favour alone, but in favour of each of the other contracting parties also; inasmuch as they were only to be jointly liable, and not the respondents only, in the first instance, with a claim of entire or partial relief, as the case might be, against the appellant;

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<sup>1</sup> Tait on the Law of Evidence, pp. 330, 342, et seq.

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

—  
9th April 1835.

besides, judgment in terms of the agreement was entered in May Rogers's favour, without objection, against both the appellant and respondents. This was nearly a month after the agreement was concluded; and it was not until May Rogers had raised letters of horning on the decret, and threatened to charge both parties to make payment, that the respondents were compelled, through the appellant's inability or unwillingness to pay his share of the costs, to pay the whole sums contained in the decree of Court. The counsel for the respondents, no doubt, consented, at the time of the agreement with May Rogers, to a request made on the part of the counsel for the appellant, that the respondents should in the meantime advance the stipulated damages; but they gave no consent that the respondents should advance more than their share of the costs awarded; and it was in consequence of the appellant's refusal to pay his share of the costs, that May Rogers was obliged to extract the decree and raise letters of horning upon it; and the respondents paid the whole, and took an assignation to the debt and diligence, in evidence of the fact and further security of their relief from the appellant. But while the respondents by their counsel acceded to the appellant's request, that they should in the first instance advance the damages to May Rogers, their consent did not in any respect interfere with the terms and conditions of the written agreement of parties; it could not extend to the third condition of that agreement, "whereby all questions of relief were reserved entire;" neither did it narrow it by restricting all questions of relief to the action of relief which had been previously raised: the consent to pay the damages to May Rogers left the contract of parties precisely where it previously stood.

**LORD CHANCELLOR.**—I shall advise your Lordships to affirm the judgment of the Court below. The sole question of any importance is, whether parole evidence is admissible for the purpose of varying the obvious import, as it strikes me, of this agreement. It is an agreement between the Canal Company on the one side, and Johnston on the other, that they will pay this money. It imports that they will pay in equal proportions, under the circumstances that have ultimately taken place. It was to be subject to all questions of relief. That question appears to be over, in consequence of the finding of the jury that the parties acted under a mistake, and that no blame was attributable to either party; under those circumstances it appears to me that the true construction is, that the two parties were each to pay their equal proportion of the expence. It is contrary to all rules of law in this country, and, if I recollect rightly from the argument, contrary to the rules of law prevailing in Scotland, to admit parole evidence for the purpose of varying a written agreement. The object of the parole evidence offered in the present instance is to put a qualification on the terms of this agreement, contrary to the obvious import of those terms as they stand on the written agreement. I am of opinion, agreeing with the opinion expressed in the Court below, that such evidence was not admissible. I am also of opinion that these two original conjoined actions and the third action that has been brought, having been joined together, are to be considered as one action. The last action became necessary in consequence of some proceeding that took place after the institution of the two original suits, namely, by the finding of the jury, from which it appeared that no blame was imputable

**JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.**

9th April 1835.

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

—  
9th April 1835.

either to the Canal Company or to Mr. Johnston. It appears to me, that on the question as to the admissibility of the evidence, and on the question as to the form of the suit below, the judgment is right, and ought to be affirmed.

LORD BROUGHAM.—I agree entirely in the view which the Lord Chancellor has taken of this case. I have only heard a portion of the argument, but from what I have heard, I entertain no doubt; and I think it important that it should be understood, that, as far as we know, the rules of evidence are not peculiar to Scotland, but that by the general and well-understood rules of evidence parole testimony is not admissible to alter, or qualify, a written instrument. Upon this subject, there is no difference between the rules that prevail here and those which prevail in Scotland. We have some niceties in the law of England which are peculiar to ourselves; but this does not appear to be one of those cases, for it depends in a great degree on principles of common sense. Where there is a writing, you naturally suppose that is the thing to which the parties have recourse. What is the use of writings, if you are to bring in parole evidence? It would tend to the great multiplication of the chances of error and perjury, to prevent which our Statute of Frauds was passed. With respect to collateral matters it is quite different. A collateral agreement is not an agreement which the parties agree to reduce to writing, and consequently they do not say, “we are to be held bound by “what we have written and signed.” I suggest to your Lordships that this is not at all a case of nicety which ought to be exempt from the general rule of allowing the respondent to have his costs. It would be a very dan-

gerous thing if, merely because there was some difference of opinion among the judges in the Court below, parties were to understand that they were at liberty to appeal, and that no costs would be given against them. An appellant might often be willing to pay his own costs for the chance of success ultimately, if he were sure that, at all events, he would not have to pay the costs of his opponent. Upon the whole, I suggest to your Lordships that this judgment ought to be affirmed, with costs.

JOHNSTON  
v.  
EDINBURGH  
AND  
GLASGOW  
UNION CANAL  
COMPANY.

9th April 1835.

It was accordingly ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, “ That the  
“ said petition and appeal be, and is hereby dismissed this  
“ House, and that the interlocutors therein complained of, be,  
“ and the same are hereby affirmed: And it is further  
“ ordered, that the appellant do pay or cause to be paid to  
“ the said respondents the costs incurred in respect of the said  
“ appeal, the amount thereof to be certified by the clerk-  
“ assistant.”

JOHN MACQUEEN—SPOTTISWOODE and ROBERTSON,—  
Solicitors.

[10th April 1835.]

**MAGISTRATES and TOWN COUNCIL of the Royal Burgh of DUNBAR, Appellants.**—*Sir W. Follett—J. A. Murray.*

**MARY Duchess Dowager of ROXBURGHE, and others, HERITORS of the Parish of DUNBAR, Respondents.**—*Lushington—Keay.*

*Poor.*—Held, (reversing the judgment of the Court of Session,) in a question between the heritors of a landward district and the magistrates of a royal burgh, both situated within one and the same parish, that the management and maintenance of the poor of the landward district were not separate from the management and maintenance of the poor within the burgh, but that the poor of both districts must be regarded as the poor of one parish.

2D DIVISION.

Ld. Mackenzie.

**THE** parish of Dunbar in the county of Haddington comprehends both the royal burgh of Dunbar and a landward district. According to the census of 1821 the population of the parish consisted of 5,272 individuals, and by the late census it was ascertained to have decreased to the extent of about 200, so that the total population was about 5,000. It was stated by the heritors (respondents) that there were ninety-nine families on the regular list of poor for the parish ; that of these, seventy were resident within the burgh, and twenty-nine in the landward district. On the other hand, the magistrates (appellants) stated, that there were only eighty individuals on the list altogether, of whom fifty-eight resided within the burgh, and the remaining thirty-two within the landward dis-



trict; and that of these fifty-eight twenty had formerly resided in the landward district, but on becoming incapable of executing agricultural labour, they had taken up their abode within the burgh; so that fifty-two individuals were truly poor belonging to the landward district, while the remaining twenty-eight formed the proper poor of the burgh. It was further stated by the magistrates, that it had never been the practice to separate the poor of the parish into two classes, viz., the poor residing within the burgh, and the poor within the landward district; whereas the heritors alleged that separate lists of these two classes had always been kept, and that a higher rate of aliment had been allowed to the poor within the landward district than to the poor within the burgh, in respect that the latter were allowed to beg within the burgh.

It was admitted by both parties, that the aggregate amount required for the whole poor of the parish was decided upon at a joint meeting of the heritors, kirk session, and a member of the town council of the burgh; that the administration of this fund had always been exercised by the kirk session alone; that collections at the church doors, and the fund when levied, together with the profits of the burgh mort-cloths and the interest of a sum of 1,500 merks Scots, which had been mortified by Jane Benning in favour of the poor of the parish, had been invariably massed, and divided among the poor of the parish without any distinction between the poor of the burgh, and the poor of the landward district.

It was alleged by the magistrates, that it had been the invariable practice to levy only one assessment for the entire parish; but the heritors denied this, and stated that the only assessment which was imposed by the kirk

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1895.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

—  
10th Apr. 1835.

session was five sixths of the sum necessary for the support of the whole poor, on the heritors and others liable within the landward district, while the other sixth was levied from those liable within the burgh, and paid by the magistrates to the kirk session.

This division of the assessment was admitted by both parties to have originated in an arrangement made between the heritors and the magistrates in the year 1724, as appeared from the following minute extracted from the records of the town council:—

Sept. 14, 1724. “ The which day the magistrates and  
“ council, considering that there was an intimation made  
“ yesterday from the pulpit, requiring the heritors of this  
“ parish to meet on Thursday next, being the seventeen  
“ instant, to concert proper measures for the maintenance  
“ of the poor of this parish, as also for repressing stranger  
“ and vagrant beggars ; they therefore nominate and ap-  
“ point Bailie John Ferguson, James Fall, and Charles  
“ Fall, to meet with the heritors, and concur with them  
“ in such measures as shall be concerted agreeable to the  
“ several acts of parliament made thereanent, and to  
“ report.”

“ The same day the magistrates and council appoint  
“ George Wilson, John Pollock, Robert Wilson, Wil-  
“ liam Hepburn, and George Kellie, as a committee,  
“ to make diligent search through the town, and report  
“ to the magistrates with all convenient speed a com-  
“ plete list of the poor within the burgh and its suburbs ;  
“ that is, such as are actually under charity, or are in  
“ such circumstances as to stand in need of it : as also to  
“ report a complete list of all strangers that have become  
“ inhabitants within this burgh within the last three  
“ years.”

“ Dunbar, 21st September, 1724 years.

“ This day the said Bailie Ferguson acquainted the  
 “ magistrates and council, that Mr. Fall and he had  
 “ met with the heritors and kirk session about the extent  
 “ and proportion of the poor’s rates in this parish :—  
 “ That they had come to a resolution, jointly with the  
 “ heritors, that the sum of one hundred and twenty  
 “ pounds sterling would, with the several funds they  
 “ hold already for the maintenance of the poor, be  
 “ sufficient for relieving the poor of this parish for the  
 “ year ensuing ; but when the question came to be  
 “ agitated, what the town’s proportion of this sum  
 “ should be, they did not find themselves sufficiently  
 “ empowered to agree to the quota insisted on by the  
 “ heritors, which was, that in consideration of the  
 “ numerous poor in the town of Dunbar, that the com-  
 “ munity should contribute one-sixth part of any sum  
 “ that should be raised by the parish for the maintenance  
 “ of the whole poor :—That he and his colleague had at  
 “ first insisted ceremoniously on fixing the town’s pro-  
 “ portion by their valued rent, in conformity to the rest of  
 “ the heritors of the parish :—That the heritors who were  
 “ present continuing to insist on the large number of  
 “ town’s poor, and the small extent of their valuation,  
 “ they took it on them, in name of the town, to offer to the  
 “ said heritors the paying of one eighth part as the town’s  
 “ proportion ; which offer the heritors did not accept of,  
 “ but still insisted they should pay one sixth : wherefore  
 “ the said Bailie and his colleague desired the further  
 “ instructions of the magistrates and council, how to  
 “ proceed in this affair. Which representation being  
 “ considered by the magistrates and council, they  
 “ unanimously approved of the conduct of the said  
 “ Bailie Ferguson and Mr. Fall in this affair, and

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.

10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ hereby empower them to set the town’s quota of the  
“ poor’s stent in the parish of Dunbar at any rate they  
“ can, not exceeding one sixth part of the whole, for  
“ which this shall be their warrant.”

“ Dunbar, 2d October, 1724 years.

“ The which day the said Bailie Ferguson reported,  
“ that he and Mr. Fall having attended the meeting of  
“ the heritors on the 21st September last, in the after-  
“ noon, and finding them insist positively that the town  
“ should pay one sixth of the money that was raised in  
“ the whole parish for the maintenance of the poor,  
“ they agreed in name of the town to that quota for  
“ the year ensuing allenarly, with a special clause in-  
“ serted in their minutes, that this should not be drawn  
“ into a precedent in any time coming; they thought  
“ it more of interest for the town to go into this measure,  
“ than to delay or obstruct so good a work as the making  
“ a provision for the poor in so effectual a manner  
“ Which representation being considered by the coun-  
“ cil, they unanimously approved of the conduct of  
“ the said Bailie Ferguson and Mr. Fall in this whole  
“ affair.”

The minute of the heritors was in these terms : “ It’s  
“ agreed by the heritors, that for making the foresaid  
“ sum of 120*l*. effectual for maintaining the poor of the  
“ town and parish of Dunbar, that five sixth parts of  
“ the said sum shall be paid by the heritors and tenants  
“ of the country part of the parish, and one sixth part  
“ by the town of Dunbar and community thereof, and  
“ that for one year allenarly, viz., from October 22d  
“ 1724 to October 22d 1725; and that this agreement  
“ shall be binding no longer, or be a precedent any  
“ manner of way for the future.”

Notwithstanding this latter qualification, it was ad-

mitted that this arrangement had uniformly since that time been acted on.

In the year 1823 a dispute having arisen between the magistrates and the heritors, the latter of whom alleged that the allotment of five sixth parts of the assessment upon them was unequal, several meetings of the heritors were held, when it was ultimately resolved by the heritors “ that in future a distinct assessment should be made “ for the burgh poor and the country poor, and levied “ from the burgh and country heritors separately, so “ that each may support its own poor.” After various attempts at an extrajudicial adjustment, which failed, the heritors in 1830 brought an action of declarator and repetition, founding on the statute 1579, cap. 74, on the proclamations of William and Mary, 11th August 1692 and 29th August 1693, and of King William, 3d March 1698, and also on the statutes 1695, cap. 43, and 1698, cap. 21, ratifying these proclamations.<sup>1</sup> They concluded

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

---

<sup>1</sup> The Act 1579, c. 74., is in these terms :—

“ *For Punishment of Strang and Idle Beggars, and Reliefe of the Pure and*  
“ *Impotent.*

“ Forsameikle as there is sundry lovabil Acts of Parliament maid  
“ be our Sovereine Lord's maist nobil progenitours, for the staunching  
“ of maisterful and idle beggars, away putting of sornares, and provision  
“ for the pure ; bearing, that nane sall be thoiled to beg, nouthir to burgh  
“ nor to land, betwixt 14 and 70 zeires. That sik as makes themselves  
“ fules, and ar bairdes, or uthers siklike runners about, being apprehended,  
“ sall be put in the Kingis waird or irones, sa long as they have ony gudes  
“ of their awin to live on. And fra they have not quhairupon to live of  
“ their awin, that their eares bee nayled to the Trone or to an uther  
“ tree, and their eares cutted off, and banished the countrie ; and gif  
“ thereafter they be found againe, that they be hanged.

“ Item, That nane bee thoiled to begge in ane parochin that ar borne  
“ in ane uther. That the heades men of ilk parochin make takinnes,  
“ and give to the beggars theirow, that they may bee sustein'd within the  
“ boundes of that parochin ; and that nane uther bee served with almes  
“ within that parochin, but they that beares that takinne allanerlie, as  
“ in the Actes of Parliament theiranent at mair length is conteined.  
“ Quhilkes, in the time bygane, hes not beene put to dewe execution,

THE  
MAGISTRATES  
OF DUNBAR

v.

THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

that it should be found and declared “ that the manage-  
“ ment and maintenance of the poor of the landward

“ threw the iniquitie and troubles of the time by-past, and be reasoun  
“ that there was not heirtofoir ane ordour of punischment, sa speciallie  
“ devised as need required, bot the saidis beggares, besides the uthers  
“ inconvenientes, quhilks they daylie produce in the commonwealth, pro-  
“ cure the wrath and displeasure of God for the wicked and ungodlie  
“ forme of living used amongs them, without marriage, or baptizing of a  
“ great number of their bairnes. Therefoir, now, for avoyding of the  
“ inconvenients, and eschewing of the confusion of sindrie lawes and  
“ actes concerning their punischment standing in affect, and that some  
“ certaine execution and gude ordour may follow thereanent, to the great  
“ pleasure of Almichtie God, and common weill of the realme; it is  
“ thocht expedient, statute, and ordained, as weil for the utter suppressing  
“ of the saidis strang and idle beggars, sa contagious enimies to the com-  
“ mon weill, as for the charitabil releiving of aged and impotent pure  
“ peopil, that the ordour and forme following bee observed; that is to  
“ say, that all persons being above the aige of fourteene and within the  
“ aige of three scoire and ten zeires, that heirafter ar declared and set  
“ foorth be this act and ordour to be vagaboundes strang and idle beggars,  
“ quhilkes sall happen at ony time heirafter, after the first day of Januar  
“ nixt to cum, to bee taken wandering and misordering themselves, con-  
“ trarie to the effect and meaning of thir presentes, sall be apprehended,  
“ and, upon their apprehension, be brocht befor the provest and baillies  
“ within the brugh, and, in everie parochin in landwart, befor him that  
“ sall be constitute Justice be the Kingis commission, or be the lords of  
“ regalitie, within the samin, to this effect; and be them to be committed  
“ in waird in the commoun prison, stokkes, or irons, within their juris-  
“ diction, there to be keeped, unlatten to libertie, or upon bande or  
“ sovertie, quhill they be put to the knowledge of ane assize, quhilk sall  
“ be done within sex dayes thereafter; and gif they happen to be con-  
“ victed, to bee adjudged to be scourged, and burnt throw the eare with  
“ ane hote iron; the processe quhairof sall be registrate in the Court  
“ buikes; except sum honest and responsal man will of his charitic bee  
“ contented then presentlie to act himselfe before the judge, to take and  
“ keip the offender in his service for ane haill zeir nixt following, under  
“ the paine of twentie pound, to the use of the pure of the town or  
“ parochin, and to bring the offendour to the head court of the juris-  
“ diction at the zeires end, or then gude prufe of his death; the clerke  
“ taking for the said acte twelve pennies onley: And gif the offender  
“ depart and leave the service within the zeir, against his will that receivis  
“ him in service, then, being apprehended, he sall be of new presented  
“ to the Judge, and, be his command, scourged and burned throw the  
“ eare, as is forsaid. Quhilk punischment, being anis received, hee sall  
“ not suffer againe the like, for the space of threescoir dayes thereafter,  
“ bot gif at the ende of the saidis lx. days, hee be founden to be fallen  
“ againe in his idle and vagabound trade of life, then, being appre-

“ district and of the burgh are separate and distinct;  
 “ and that the pursuers, as heritors of the landward dis-

THE  
 MAGISTRATES  
 OF DUNBAR

v.

THE HERITORS  
 OF DUNBAR.

“ hended of new, he sall be adjudged, and suffer the pains of death as a  
 “ thief.

10th Apr. 1835.

“ And that it may be knawn, quhat maner of persones ar meant to  
 “ be idle and strang vagabounds, and worthie of the punischment before  
 “ specified, It is declared, that all idle persones, ganging about in ony  
 “ countrie of this realme, using subtil, craftie, and unlauchful playes, as  
 “ juglarie, fast-and-lous, and sik uthers. The idle peopil calling them-  
 “ selves Ægyptians, or any uther that feinzies them to have knowlege or  
 “ charming, prophecie, or uthers abused sciences, quhairby they persuade  
 “ the peopil that they can tell their weirdes, deathes, and fortunes, and  
 “ sik uther phantastical imaginations; and all persones being hail and  
 “ starke in bodie, and abill to worke, alledging them to have been herried  
 “ or burnt in sum far pairt of the realme, or alledging them to be ba-  
 “ nished for slauchter, and uthers wicked deides; and uthers nouthar  
 “ havand land nor maisters, nor using ony lauchful merchandice, craft, or  
 “ occupation, quhairby they may win their livings, and can give na  
 “ reckoning how they lauchfullie get their living; and all minstrelles,  
 “ sangsters, and tale-tellers, not avowed in special service be sum of the  
 “ lords of parliament or great burrowes, or be the head burrowes and  
 “ cities, for their commoun minstrelles; all commoun labourers, being  
 “ persones abill in bodie, living idle, and fleeing labour; all counter-  
 “ faicters of licences to beg, or using the same knowing them to be coun-  
 “ terfaicted; all vagabound schollers of the Universities of Saint Andrewes,  
 “ Glasgow, and Abirdene, not licensed be the rector and deane of facultie  
 “ of the Universitie to ask almes; all schipmen and mariners, alledging  
 “ themselves to be schipbroken, without they have sufficient testimonials,  
 “ sall be taken, adjudged, esteemed, and punished, as strang beggarres and  
 “ vagaboundes. And gif ony person or persones, after the said first of  
 “ Januar nixt to cum, gives money, harberie, or ludgeings, settis houses,  
 “ or shawes ony uther reliefe to ony vagabound or strang beggar, marked  
 “ or to be marked, wanting an licence of the provest and baillies within  
 “ burgh, or of the judge within that parochin: The samin being dewlie  
 “ provin at the court, they sall pay sik unlaw to the use of the pure of  
 “ the parochin, as be the judge at the court sall be modified, swa the  
 “ same exceed not five pundis. And alsua, gif any person or persones,  
 “ disturbis or lettis the execution of this act ony maner of wayes, or makis  
 “ impediment against the judges and ordinarie officers, or uthers per-  
 “ sones, travelling for the dew execution heirof, they sall incur the same  
 “ paine quhilk the vagabound suld have incurred in case he had bene  
 “ convict. Providing alwayes that schipmen and souldiours, landing in  
 “ this realme, have licence of the provest or baillies of the towne, or  
 “ the judge of the parochin, quhair they war schippebroken, or first  
 “ entered in the realme, sall and may passe, according to the effect of  
 “ their licences, to the rowmes quhair they intend to remayne. And that  
 “ the licence onelie serve in the jurisdiction of the giver; sa that gif

THE  
MAGISTRATES  
OF DUNBAR

v.

THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ and council, as representing the community of the  
“ said burgh of Dunbar, ought and should be decerned

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“ zeir, anis at the least, to the provests and baillies in the burrowes, and  
“ to the saidis judges in land-wart, and to deliver the super-plus of that  
“ quhilk restes in their handes, at the end of the zeir or half zeir, to sik  
“ as sall be chosen collectours of the new: Then ilk-ane of the offenders  
“ so offending sall in-cur the paine of twentie punds, to the use of the  
“ pure of that parochin, and imprisonment of their persones during the  
“ kingis will: For quhilkes paines, the saidis provests, baillies, and judges,  
“ sall poynd and distrenzie: And gif ony persones, being abill to further  
“ this charitable woorke, will obstinatie refuse to contribute to the releife  
“ of the pure, or discourage uthers from sa charitabil ane deede, the  
“ obstinate or wilful person, being called befor the saidis provests and  
“ baillies within burgh, or judges in the parochins to land-wart, and  
“ convict thereof be ane assise, on sufficient testimonie of twa honest and  
“ famous witnesses his nichtbours, upon the supplication of the saidis  
“ provests, baillies, and judges to the Kingis Majestie and Prive Council,  
“ the obstinate and wilful person or persones, sall be commanded to  
“ waird in sik pairt, as his hienes, and his council sall appoynt, and there  
“ remaine quhill he be content with the ordour of his said paroch, and  
“ performe the same in deede: And gif the aged and impotent persones,  
“ not being sa diseased, lamed, or impotent, bot that they may worke in  
“ sum maner of wark, sall be bee the overseeres in ony burgh or parochin  
“ appoynted to wark, and zit reffusis the same: Then, first the refuser  
“ to be scourged, and put in the stokkes; and for the second fault to be  
“ punished as vagabounds, as said is. And gif any begers bairne, being  
“ above the age of five zeirs, and within fourteene, male or female, sall  
“ be liked of be ony subject of the realme of honest estait, the said  
“ person sall have the bairne, be the ordoure and drection of the said  
“ provest and baillies within burgh, or the judge of every parochin to  
“ land-wart, gif he be a man-child, to the age of xxiv. zeires, and gif  
“ sche be a woman-child to the age of xvij. zeires: And gif they depart,  
“ or be taken or intised from their maister or maistresse service, the  
“ maister or maistresse, to have the like action and remedie, as for their  
“ hired servand or prentises, asweil against the bairne, as against the taker  
“ and intiser thereof. And quhair collecting of money may not be had,  
“ and that it is over great ane burding to the collectours to gadder  
“ victualles, meat, and drink, or uther things for the releife of the pure  
“ in some parochines, That the provest and baillies in burrowes, and  
“ the saidis judges in the parochines to land-wart, be advise of certaine  
“ of the maist honest parochiners, give licence under their handwrits to  
“ sik and sa many of the saidis pure peopil, or sik uthers of them as  
“ they sall think gude, to ask and gadder the charitabil almes of the  
“ parochiners at their awin houses. Sa as alwayes, it bee speedily  
“ appoynted and agried, how the pure of that parochin, sall be sustained  
“ within the same, and not to be chargeable to uthers, nor troublesome  
“ to strangers. And seeing the reason of this present act and ordour,



“ and ordained by decree foresaid to sustain and  
 “ manage the poor of the said burgh according to law ;

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.

10th Apr. 1835.

“ the commoun prisone, irrones, and stokkes of everie head burgh of the  
 “ schire, and uthers townes, ar like to be filled with ane great number  
 “ of prisoners, nor of befoir hes bene accustomat, in sa far as the saidis  
 “ vagaboundes, and uthers offenders, ar to be committed to the commoun  
 “ prison of the schire or towne quhair they were taken, the same prisones  
 “ being in sik townes quhair there is a great number of pure peopil,  
 “ mair nor they ar weill abill to susteine and relieve : And sa the pri-  
 “ soners ar like to perish in default of sustenance : Therefoir, the expenses  
 “ of the prisoners sall be payed be a pairt of the commoun contributions  
 “ and oulkly almes of the parochin quhair he or sche was apprehended,  
 “ allowand to ilk person ane punde of ait breade, and water to drink :  
 “ For payment quhair of, the presenter of him to prison sall give sovertie,  
 “ or make present payment : And that the schireffes, stewardes, and  
 “ baillies of regalities, and their baillies over all the realme, and their  
 “ deputes, see this present act put to dew execution in all poyntes, within  
 “ their jurisdictions respectivè, as they will answer to God and our  
 “ Soveraine Lord thereupon : And quhat ever doubt or ambiguitie sall  
 “ happen to arise upon this act, or ony pairt thereof, Our Soveraine  
 “ Lord, with advise of his saidis three estaites, commitis the interpretation,  
 “ explanation, suppliement, and full execution thereof, to his Majestie  
 “ with advise of his Privie Council.”

The Proclamation, 11th August 1692, is in these terms :—

*“ Proclamation of the Privy Council anent Beggars.*

“ WILLIAM and MARY, &c. to  
 “ Macers of our Privy Council, messengers-at-arms, our Sheriffs in that  
 “ part, conjunctly and severally, especially constitute, greeting : Whereas  
 “ several good laws have been made by our royal predecessors for main-  
 “ taining the poor, and relieving the lieges of the burden of vagabonds ;  
 “ in prosecution whereof, we hereby require the heritors, ministers, and  
 “ elders of every parish, to meet on the second Tuesday of September  
 “ next at their parish kirk, and there to make lists of all the poor within  
 “ their parish, and to cast up the quota of what may entertain them  
 “ according to their respective needs ; and to cast the said quota the one  
 “ half upon the heritors and the other half upon the householders of the  
 “ parish ; and to collect the same in the beginning of every week, month,  
 “ or quarter, as they shall judge most fit ; and to appoint two overseers  
 “ yearly to collect and distribute the said maintenance to the poor, accord-  
 “ ing to their several needs ; and likewise to appoint an officer to serve  
 “ under the said overseers, for inbringing of the maintenance, and for  
 “ expelling stranger vagabonds from the parish, whose fee is to be stented  
 “ on the parish, as the rest of the maintenance for the poor is stented.  
 “ And such poor as are not provided of houses for themselves or by their  
 “ friends, the heritors are to provide them with houses on the expence of  
 “ the parish, in manner foresaid.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ or otherwise, in the event of the pursuers failing in  
“ the above conclusion of their action, then in that case

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“ And if any parish shall fail in providing sufficiently for their own  
“ poor, the parish so failing shall pay the sum of 200*l.* Scots, to be  
“ uplifted, a third part to the pursuer, and two parts to be applied to the  
“ maintenance of the poor of the parish, and that monthly, toties quoties,  
“ as they shall fail in their duty. And if there be any mortifications  
“ already, or if any hereafter shall accrue to any parish, the same shall be  
“ applied, by the advice of the heritors and elders, to the use aforesaid,  
“ but without diminution of the stock of the said mortifications. And  
“ the heritors and elders are hereby appointed to have a second meeting  
“ at the said parish kirks this year, on the second Tuesday of October  
“ next, for a more exact settling of the matter ; and yearly thereafter,  
“ the heritors, ministers, and elders of every parish are to meet on the  
“ first Tuesday of February, and the first Tuesday of August, yearly, to  
“ consult and determine herein as shall be thought fit, for every ensuing  
“ half-year, and to appoint overseers by the year or half-year, as they  
“ shall conclude.

“ And all the ministers are hereby required to give timeous information  
“ to the Sheriff of the shire, if any parish shall fail in performance of this  
“ Christian duty, in whole or in part ; and the sheriff or sheriff depute  
“ are hereby required to call the delinquent before them without any  
“ delay, and, if guilty, to fine them in double the quota which the  
“ minister shall attest to be wanting, and to cause poind for the same  
“ immediately. And where churches are vacant, that two of the greatest  
“ heritors residing within the parish shall be appointed by the first meet-  
“ ing in September next, to inquire into the duty of parishioners and  
“ overseers, and to inform the sheriff of their delinquency.

“ And if any of the poor of the parish are able to work, the heritors  
“ of the parish are hereby authorized and required to put them to work  
“ according to their capacities, either within the parish or to any adjacent  
“ manufactory, as they shall find expedient, furnishing them always with  
“ meat and cloth.

“ And if any young children be found begging under the age of  
“ fifteen years, any person who shall take the said children and bring  
“ them before the heritors, ministers, and elders, and cause registrate the  
“ name and designation of the child in the session book, and shall there  
“ enact himself to educate the said child either to trade or work, and take  
“ an extract of the act from the clerk of the session, the said child shall  
“ be obliged to serve the said person so educating him for meat and  
“ cloaths, until he pass the thirtieth year of his age. And all manu-  
“ factories are declared to have the same privilege as to the education of  
“ such young ones ; and this to extend, not only to the children of  
“ beggars, but also to poor children whose parents are dead, or with con-  
“ sent of the parents, if they be alive : and if any young ones, about  
“ fifteen years of age, shall voluntarily engage themselves upon the like  
“ conditions, and if any of the young ones, so educated, shall disobey

“ it ought and should be found and declared by decree  
“ foresaid, that the power of taking up the lists of the

THE  
MAGISTRATES  
OF DUNBAR

v.

THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ their masters when reasonably employed, their masters are hereby  
“ warranted to correct them as they judge expedient, life and torture  
“ excepted ; and if any person harbour or reset any such servant belonging  
“ to any other, they shall return them to their master on demand, under  
“ the pain of one hundred merks, toties quoties, as oft as they shall be  
“ required so to do : And if any master shall exact any inhuman or too  
“ rigid service from any such servants, the sheriffs or justices of peace,  
“ upon application of the servants, are to judge in the case, and if the  
“ severity so deserve, the servant may be loosed from such a master, the  
“ servant, or some for him, paying the master as much yearly as the fee  
“ of servants of that quality would extend to each year, to the number  
“ of years wanting to the thirtieth year of the servant's age. And the  
“ heritors meeting on the days appointed, or major part of them, are  
“ authorized and required to conclude and determine matters for that  
“ half-year.

“ And to the end that the poor may be returned to their own parishes,  
“ and the nation freed of vagabonds, we strictly require and command  
“ all beggars within the kingdom forthwith to repair to their several  
“ parishes with all diligence, and to keep the ordinary highways to the  
“ same ; and so soon as they come to their parish, to present themselves  
“ to the heritors and elders, that their names may be listed amongst the  
“ poor of the parish, and they lodged and entertained accordingly ; with  
“ certifications to all who shall be found begging without the bounds of  
“ their parish after the said second Tuesday of September next, they  
“ shall be seized as vagabonds, imprisoned, and fed on bread and water  
“ for a month, or till they be sent home to their parish, in manner after  
“ mentioned ; and if they be found vaguing a second time, they are to  
“ be marked with an iron on the face ; and all the lieges are hereby pro-  
“ hibited to give any almes to such begging vagabounds, other than  
“ bread and water allenarly, after the second Tuesday of September,  
“ until they arrive at their own parishes.

“ And to the end that our will hereanent may be more speedily made  
“ practicable, we strictly command and charge all our lieges within this  
“ our ancient kingdom, to apprehend such beggars as they shall find  
“ vaguing without their own parish after the second Tuesday of Sep-  
“ tember, and forthwith to carry them to the principal heritor of the  
“ parish where they were apprehended, if it be in landward, and to one  
“ of the baillies in towns, who shall examine the beggar in the shire and  
“ parish where he was born, and shall direct him forthwith to the nearest  
“ parish that lies in the road to the parish of his birth, and deliver him  
“ to the nearest heritor that lies in that highway in the next parish, and  
“ so forth from parish to parish in the same road, until he arrive at the  
“ parish of his nativity, who shall then list him, and entertain him amongst  
“ the poor ; and the heritors to whom the vagabonds are delivered, are  
“ hereby authorized and required to send two fencible men of their

THE  
MAGISTRATES  
OF DUNBAR

v.

THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ aggregate poor, determining the assessments, and  
“ managing the funds belongs to the meeting of heri-

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“ parish to convey every beggar to the heritor of the next parish, and to  
“ send a note of the beggar's name and the parish where he was born,  
“ which is to be delivered to the next heritor who receives him ; and  
“ every heritor who receives him is to return a note signed of his reit,  
“ and so forth, from heritor to heritor, in every several parish ; and if any  
“ of the saids beggars offer to make their escape in their transportation,  
“ the beggar so doing shall be scourged, and fed with bread and water  
“ during the rest of his journey. And whoever gives almes to any  
“ beggar not in their parish after the second Tuesday of September, and  
“ shall not seize him, in order to his transportation, as said is, shall be  
“ fined in 20s. Scots, toties quoties, to be uplifted by the overseers,  
“ and applied to the use of the poor of the parish. And if the heritor  
“ to whom the vagabound be brought fail in his duty of sending him,  
“ he shall be fined in 20l. Scots, toties quoties, to be applied as said is.  
“ If any fencible man sent to convey them refuse or fail in his duty, he is  
“ to be fined in two merks Scots, toties quoties, to be applied as said is ;  
“ and the said fencible men are to be chosen by turns, as the said parishers.

“ And whereas by Act 18, Session 3, Parliament 2, Charles II.,  
“ correction-houses are appointed to be erected in several burghs therein  
“ mentioned, for employing the poor people in work, as they are capable,  
“ which have hitherto too much neglected, (until the lesser burghs be able  
“ to perform what is there required, lest so good a design should totally  
“ fail,) we hereby strictly require our burghs of Edinburgh, Stirling,  
“ Dundee, Aberdeen, Inverness, Glasgow, Jedburgh, Dumfries, and  
“ Cupar in Fife, or such of them as have not already established correction-  
“ houses, in the manner and to the ends prescribed by the said act, to  
“ erect and establish such houses, and to receive such poor for work  
“ therein as shall be sent to them from any parish, in manner and on the  
“ conditions prescribed by that act and this, but prejudice of erecting of  
“ correction-houses in other burghs therein mentioned with all con-  
“ veniency. Our will is herefore ; and we charge you strictly, and  
“ command that incontinent, these our letters seen, ye pass to the  
“ Market Cross of Edinburgh, and to the Market Crosses of the whole  
“ head burghs of the several shires of this kingdom, and there, in our  
“ name and authority, by open proclamation, make publication of the  
“ premises, that none pretend ignorance : And ordains these presents to  
“ be printed.”

The proclamation of 29th August 1693 is in these terms :—

“ *A Proclamation of the Privy Council anent Beggars.*

“ WILLIAM and MARY, &c. Forasmuch as the intent and design of our  
“ Proclamation, of date 11th August 1692, requiring all beggars within  
“ this kingdom forthwith to repair to their several parishes with all dili-  
“ gence, hath been much disappointed and frustrated by the uncertainty  
“ of the parishes where the said respective beggars have been born, and

# THE HOUSE OF LORDS.

1.

“ tors, provost, minister, and elders ; and that the assess-  
 “ ments to be imposed for the support of the aggregate

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.

10th Apr. 1835.

“ for want of suitable provision made by the heritors and magistrates of  
 “ the respective parishes where the said beggars have been born, or had  
 “ their last seven years residence ; for remeid whereof, we, with the advice  
 “ of the lords of our Privy Council, strictly require and command all the  
 “ beggars within this kingdom immediately to repair to the several  
 “ parishes where they were born ; or where the parish or place of  
 “ their birth is not certain or distinctly known, that they repair to the  
 “ parishes where they last resided for the space of seven years together,  
 “ and to keep the ordinary highways to the several parishes of their birth,  
 “ or last seven years residence ; and so soon as they come to the said re-  
 “ spective parishes, to present themselves to the heritors and elders ; and  
 “ where parishes are vacant, and have no elders, to the heritors alone,  
 “ whom we, with advice foresaid, require and command to make the  
 “ provisions necessary for the said beggars, and to list their names among  
 “ the poor of the parish, that they may be lodged and entertained accord-  
 “ ingly, with certification to all who shall be found begging after the  
 “ second Tuesday of September next, they shall be seized as vagabounds,  
 “ imprisoned, and fed with bread and water for a month, or till they be  
 “ sent home to the respective parish of their birth, or last seven years  
 “ residence, in manner mentioned in our said former proclamation : And  
 “ we, with advice foresaid, require and command the magistrates of our  
 “ burghs royal to meet and stent themselves conform to such order and  
 “ custom, used and wonted, in laying on stents, annuities, or other public  
 “ burdens, in the respective burgh, as may be most effectual to reach all  
 “ the inhabitants : And the heritors of the several vacant parishes likewise  
 “ to meet and stent themselves, for the maintenance of their said respective  
 “ poor ; and to appoint the ingathering, uplifting, and applying of the  
 “ same for the uses foresaid, sicklike, and in the same manner as the  
 “ heritors and elders are appointed by our former proclamation : And all  
 “ the ministers and heritors are hereby required to give timeous intima-  
 “ tion to the sheriff of the shire, if any parish or person shall fail in per-  
 “ formance of this Christian duty, in hail or in pairt, and the sheriff or  
 “ sheriff depute are hereby required to call the delinquents before them  
 “ without any delay ; and if guilty, to fine them in double of the quota  
 “ which the ministers or heritors shall attest to be wanting, and to cause  
 “ poind for the same immediately. And further, for preventing of any  
 “ question that may arise betwixt the heritors and kirk session in the  
 “ several parishes of this kingdom, about the quota of the collections at  
 “ at the church doors, and otherwise to be made by the said session, to be  
 “ paid into the heritors for the end foresaid, we do hereby, with advice  
 “ foresaid, determine the same to be the half of the said collections, and  
 “ ordains the said kirk session to pay in the same from time to time to  
 “ the said heritors, or any to be by them appointed accordingly ; and we  
 “ ordain our said former proclamation to stand in full force, &c. and to  
 “ be put in execution, in so far as the same is not hereby altered.”

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1885.

“ poor shall be laid on the whole inhabitants of the  
“ parish equally, whether in burgh or to landward, ‘ ac-

The proclamation of 3d March 1698 is in these terms :—

“ *Proclamation anent the Poor.*

“ WILLIAM, &c. That where the many good and laudable laws made  
“ for maintaining the poor, and suppressing of beggars, vagabounds, and  
“ idle persons, have not hitherto taken effect, partly because there were  
“ no houses provided for them to reside in, and partly because the persons  
“ to whom the execution of these laws was committed have been negligent  
“ of their duty ; for remeid whereof, we, with the advice of the lords of  
“ our Privy Council, ordain the former proclamations formerly emitted,  
“ of the date the 11th August 1692, the 29th August 1693, and last of  
“ July 1694, ratified and approven by act 29, session 6, of our current  
“ Parliament, to be reprinted, and put to full and vigorous execution in  
“ all points : And in order to make the said proclamations the more  
“ effectual, we, with the advice foresaid, revive act 18, sess. 3. Parl. 11.  
“ Charles II., in so far as concerns the providing correction-houses for  
“ the receiving and entertaining of beggars, vagabounds, and idle per-  
“ sons, within the burghs therein mentioned,—viz. one correction-house  
“ at the burgh of Edinburgh, for those of the town and shire of Edin-  
“ burgh, (*a number of others are then mentioned*) each of which houses  
“ shall have a large closs, sufficiently enclosed for keeping in the said  
“ poor people, that they be not necessitate to be always within doors, to  
“ the hurt or hazard of their health : And ordains the said magistrates  
“ of the said burghs to provide the correction-houses, and appoint mas-  
“ ters and overseers for the same, by advice of the presbytery, or such as  
“ they shall appoint, who may set the poor persons to work, and that  
“ betwixt and the 1st day of October next, under the paid of 500 merks  
“ quarterly, until correction-houses be provided for conform to the said  
“ act.

“ But in place of the commissioners of excise, mentioned in the same  
“ act, we, with advice foresaid, require and command the Sheriffs of the  
“ shires and their Deputes to put the said act in execution within their  
“ respective shires, as to every thing that by the said act was committed  
“ to the Commissioners of Excise ; and ordains the said Sheriffs and their  
“ Deputes to give account of their diligence herein, betwixt and the 1st  
“ of December, under the pain, every one of them, of 500 merks, who  
“ shall failzie and neglect to do the samen, to be employed for the use of  
“ the poor of the shire, and to be liable in 100*l.* weekly, after the said day  
“ before they return an account of their diligence to our Privy Council,  
“ to be employed for the use foresaid.

“ And ordains the several parishes within every shire and district, to  
“ send their poor to the magistrates of the towns where the correction-  
“ houses are to be provided, against the 1st day of November next, that  
“ they may be put into the said correction-houses : And in case the said  
“ correction-houses be not ready to serve the poor against the said day,  
“ ordains the poor to be sent to be maintained by the magistrates of the

“ ‘ cording to the estimation of their substance, without  
 “ ‘ exception of persons ;’ or our said Lords ought and  
 “ should find and declare in the premises as to them  
 “ shall seem just.” They further concluded for repetition of such sum as should be ascertained “ to be the  
 “ excess of assessments contributed by the pursuers  
 “ during the course of the process beyond the proportion for which they are justly liable under the foregoing declarator, with the legal interest due thereon  
 “ from the periods of payment.”

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

The discussion was confined to the leading conclusion, the alternative one being postponed till that primary one should be disposed of.

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“ burgh who were to provide the said correction-houses, and that aye  
 “ and while the correction-houses be provided ; and that by and attour  
 “ the foresaid penalties imposed by the said Act of Parliament, in case  
 “ of failzieing of providing the said correction-houses against the said  
 “ day : And in the mean time, before the said correction-houses be provided, ordains the said acts and proclamations of our Privy Council to  
 “ be put to full execution.

“ And because there may some questions arise in putting the said acts  
 “ in execution for which there can be no general rule set down, in respect of the different conditions and circumstances of several places of  
 “ the country, therefore, that the said act may be more effectually, and  
 “ with greater expedition, put in execution, we, with advice foresaid, give  
 “ power and warrant to the ministers and elders of each parish, with  
 “ advice of the heritors, or so many of them as shall meet and concur  
 “ with the ministers and elders, upon intimation to be made by the  
 “ minister from the pulpit upon the Sabbath-day before, to decide and  
 “ determine all questions that may arise in the respective parishes in  
 “ relation to the ordering and disposing of the poor, in so far as it is not  
 “ determined by the laws and Acts of Parliament, and the former Acts of  
 “ our Privy Council, which are ratified by the Act of Parliament foresaid. Our will is herefore, and we charge you strictly, and command  
 “ that incontinent, these our letters seen, ye pass to the Market Cross of  
 “ Edinburgh, and remanent Market Crosses of the head burghs of the  
 “ several shires and stewartries within this kingdom, and thereat, in  
 “ our name and authority, by open proclamation, make intimation hereof, that none may pretend ignorance : And ordain these presents to  
 “ be printed.”

THE  
MAGISTRATES  
OF DUNBAR

v,  
THE HERITORS  
OF DUNBAR.

—  
10th Apr. 1835.

The magistrates in defence pleaded—1. That “ it was  
“ contrary both to the letter and spirit of the poor laws,  
“ to make any separation of the parochial poor into two  
“ classes, or to subdivide the parochial fund for the sup-  
“ port of the poor into two distinct funds,—the one  
“ liable for the support of the burgh poor, and the  
“ other for support of the poor who live to landward.”  
And—2. Referring to the practice which had existed,  
they contended that “ there was no sufficient ground  
“ either in law or otherwise for overturning or in any-  
“ wise altering the existing rule and practice of contri-  
“ bution and assessment in Dunbar parish; and if the  
“ heritors were entitled to interfere with the existing  
“ practice, and to insist on a new arrangement of  
“ interests, as between them and the magistrates of the  
“ burgh, the defenders were entitled to insist on having  
“ all things restored to their original position; and more  
“ especially they were entitled to a reconveyance of the  
“ burgh mort-cloths, and to have the proceeds of Bin-  
“ ning’s mortification duly applied to the purposes for  
“ which it was given.” On the other hand the heritors  
pleaded—1. That “ by the statutes and proclamations  
“ relative to the poor, the management and maintenance  
“ of the poor of royal burghs was totally distinct and sepa-  
“ rate from that of the landward portion of the parish in  
“ which the burgh is situated; that the magistrates had  
“ no powers for carrying the poor laws into execution  
“ in the landward district, nor the heritors and the kirk  
“ session in the burgh; and according to the true con-  
“ struction of the statutes and proclamations, the poor  
“ of the burgh and of the landward district must be  
“ supported and managed separately and distinctly by  
“ the burgh and the landward district respectively.”



And—2. That “no length of usage could prevent the heritors and kirk session of a parish, or the magistrates of a burgh, from reverting even from one legal mode of assessing for and maintaining the poor to another, and still less could it prevent them from turning from an illegal mode to one sanctioned by law.”

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

In the meanwhile a similar dispute had arisen between the heritors of the parish of Lanark and the magistrates of the burgh of Lanark; and in order to have the question tried, the magistrates of Lanark caused a burgh pauper to present an application to themselves, and also another to the kirk session for aliment. The magistrates granted the pauper an aliment to the extent of one third of what they deemed sufficient maintenance; this third being the proportion which they thought it reasonable the burgh should contribute. The kirk session, on the other hand, refused the application to them altogether, on the ground that the pauper did not belong to the landward district. These judgments were brought under review of the Court of Session, in the name of the pauper, by separate advocations. These advocations were thereupon conjoined; and Lord Medwyn, Ordinary, reported them to the Court on Cases, who ordered them to be laid before the other judges for their opinion.

With the view of bringing the present question under the consideration of the Court at the same time, Lord Mackenzie, before whom it depended, also reported it upon Cases; but before they were lodged, the judges had communicated their opinions in the Lanark cause. The Court, however, before pronouncing judgment in the present case, directed the Cases to be laid before their Lordships for their opinions.

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

In the Lanark cause LORDS PRESIDENT, BALGRAY, GILLIES, COREHOUSE, FULLERTON, and MONCREIFF delivered this opinion:—“ On considering all the acts of parliament and proclamations of the privy council on the subject of assessments and maintenance of the poor, we are of opinion that there can be but one list or roll of poor in any parish, whether entirely burghal, entirely landward, or partly burghal and partly landward; and that there cannot be two lists or rolls, one of burgh poor and the other of country poor, but that they are all indiscriminately the poor of the parish, and entitled to relief out of the whole funds of the parish.

“ Specific rules are laid down for assessments in the cases of parishes wholly burghal or wholly landward; but we do not find any specific rule for levying assessments for the poor in mixed parishes, such as Lanark; and by the returns laid before us, which were taken in the case of Parker v. Buchanan, we observe that the practice is different in different parishes of a mixed character; and therefore, as no rule for such parishes is laid down by parliament, we are of opinion that each mixed parish ought to continue to follow the rule of assessment used and wont.

“ If any such practice has existed in Lanark, we think it ought to be continued; if there be none, which seems to be the fact, we think that, having fixed that there can be but one list or roll of poor, that the heritors, kirk session, and magistrates ought to be left, in the first instance, to try to arrange what in the circumstances of their parish will be the most fair and equitable mode of laying on the assessment.

“ We observe, that in the case of Scott v. Fraser, 19th January and 5th March 1773, (observed by

“ Lord Hailes, p. 523,) the Court authorized the assess-  
 “ ment to be levied according to the real rent.

“ This was in a case very similar, viz., the West Kirk  
 “ parish of Edinburgh, in which, though there is not a  
 “ royal burgh, there are burghs of barony and regality ;  
 “ and we rather think, that this is the only fair and  
 “ equitable rule in all cases of parishes partly burgal  
 “ and partly landward, and is analogous to the rule now  
 “ fixed by the House of Lords for building kirks, by  
 “ the cases of Peterhead and Crieff.”

In the present case their Lordships delivered this  
 opinion :—“ Agreeably to the opinion we have given in  
 “ the case of Lanark, that, as there is no rule laid down  
 “ by any of the acts for mixed parishes, partly landward  
 “ and partly burgal, each parish of that description  
 “ ought to continue to follow the rule of assessment used  
 “ and wont ; and therefore, as there has been a rule  
 “ acted upon in the parish of Dunbar for a great length  
 “ of time, we are of opinion that this rule of assessments  
 “ ought to be continued.”

In the Lanark cause LORD CRAIGIE gave this  
 opinion :—“ The general points of law which are the  
 “ subject of the present consultation are of great impor-  
 “ tance, and attended with considerable difficulty ; but  
 “ upon the grounds stated in the opinions already given,  
 “ it does not appear that in the actions now depending  
 “ any conclusive or satisfactory determination can at this  
 “ time be given with regard to them.

“ In the parish of Lanark no assessments for the  
 “ support of the poor were imposed until the year 1814,  
 “ the whole expence being defrayed out of certain funds,  
 “ real and personal, under the management of the kirk

THE  
 MAGISTRATES  
 OF DUNBAR

v.  
 THE HERITORS  
 OF DUNBAR.

10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ session. At that time, although contrary to the will  
“ of the donors, where the funds had been derived from  
“ individual endowments, and in all cases in opposition  
“ to the proclamation of the Scots privy council,  
“ (proclamation, 11th August 1692,) the whole had  
“ been exhausted.

“ From 1814 until the commencement of the present  
“ litigation, it is on all sides agreed that assessments  
“ were imposed and levied separately in the burgh and  
“ in the landward district of the parish; the inhabitants  
“ of the burgh, however, as distinguished from the  
“ proprietors and tenants of land or houses, being  
“ exempted.

“ In 1828, in the name of Jean Ferrier, one of the  
“ paupers residing in the burgh, but at the expence of  
“ the magistrates, proceedings were held before the  
“ magistrates and in the kirk session of the parish, in  
“ which the magistrates declared their willingness to  
“ defray one third of the expence necessary for the  
“ pursuer's maintenance, while the kirk session refused  
“ the application in toto, on the ground of the pauper's  
“ residence being within the burgh.

“ Against these proceedings there are two advoca-  
“ tions, both in the name of the pauper, one directed  
“ against the kirk session and heritors in the landward  
“ district, and the other against the magistrates of the  
“ burgh. In the answers given in for the magistrates,  
“ instead of opposing the prayer of the application,  
“ they, as might be expected, agree to every thing which  
“ had been proposed in the name of the pauper, viz.,  
“ that the whole poor in the parish ought to be sup-  
“ ported in the same manner. Whether the inhabitants

“ in the burgh, quà such, were again to be exempted,  
 “ is not expressly said, but they have not been called as  
 “ parties.

“ In these circumstances, I consider the proceedings  
 “ as irregular in every point of view. Under the autho-  
 “ rity of the usage, ever since an assessment was laid on,  
 “ the paupers within the burgh have been maintained  
 “ out of the funds of the burgh; and unless at the sug-  
 “ gestion of the magistrates, the pursuer had no occasion  
 “ to interpose more than the other paupers, who, as  
 “ well as the pursuer herself, it must be presumed, are  
 “ still supported as formerly; and the same uniform  
 “ course ought to be followed, until a declaratory action  
 “ is brought and decided upon. This was the principle  
 “ of the decision of the Court, after a consultation, in  
 “ the late case of Colville and others against Graham  
 “ and others, where some doubt might have been enter-  
 “ tained as to the application of the general rule; and  
 “ I well remember a similar decision many years ago,  
 “ in a question between the magistrates of Perth and  
 “ some landward heritors, in one of the four parishes  
 “ into which the city had been divided, where the Court  
 “ were unanimous; and indeed, unless the same deter-  
 “ mination were to be given in all similar cases, the  
 “ whole paupers in the parish, where the dispute arises,  
 “ might remain without support until a final decision  
 “ was given.

“ It is therefore humbly thought, that the bill of  
 “ advocacy, so far as relates to the landward heritors,  
 “ should be dismissed, or superseded, until the necessary  
 “ declaratory actions are brought; while in the separate  
 “ bill of advocacy against the magistrates there should  
 “ be a remit, with instructions to the magistrates in the

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.

10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ meanwhile to advance to the pursuer, as well as to  
“ the other individuals similarly situated, the necessary  
“ and ordinary supplies.

“ According to this view, there would be no occasion  
“ at the present time to make any further observations;  
“ but as the interlocutor in the other division of the  
“ Court calls for an opinion upon the general questions  
“ discussed in the pleadings, I shall proceed to state, as  
“ briefly as I can, what has occurred to me on the sub-  
“ ject. My opinion is the same which has been already  
“ given in this case by the kirk session of the parish.

“ The general scope and object of the law of Scot-  
“ land in reference to the support of the poor, depend-  
“ ing upon the particular enactments referred to by the  
“ parties, joined to various proclamations of the secret  
“ or privy council of Scotland as authorized or ratified  
“ in parliament, appear to be, 1st, To distinguish be-  
“ tween those who by infirmity or disease are unable  
“ to work for their livelihood, and those who are not  
“ willing to work though able; with regard to the  
“ latter strong and coercive measures are to be fol-  
“ lowed; but these do not fall under the present discus-  
“ sion. 2d, With regard to the former class or des-  
“ cription of persons, to impose the burden of supporting  
“ them (but, as it appears, most justly and expediently,  
“ only so far as necessary to prevent the individuals  
“ from perishing for want of food or other necessaries,)  
“ on the different parishes where the paupers were born,  
“ or where they had resided during a certain number  
“ of years preceding poverty; and 3d, To make a dis-  
“ tinction in the mode of raising the necessary supplies  
“ between parishes consisting entirely either of a land-  
“ ward district or of a royal burgh. Of other burghs,

“ whether of regality or barony, no notice is taken,  
 “ because in this, as well as in other respects, (1 Ersk. 4,  
 “ 30, 15th November 1759, Park,) these establishments  
 “ were not in general considered as separated from the  
 “ other parts of the regality or barony. In the case of  
 “ Greenock, 31st May 1822, not reported, the point  
 “ was held to be fixed.—Act 1597, c. 279; proclama-  
 “ tion, 29th August 1693.

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.  
 —  
 10th Apr. 1835.

“ In royal burghs the care of the poor was left to  
 “ the magistrates, the sums necessary being to be raised  
 “ along with the stent or assessment at the time imposed  
 “ for the other exigencies of the community, or, in other  
 “ words, according to the estimation of their substance;  
 “ the whole inhabitants being thus made liable where  
 “ they had the means of paying.

“ In landward parishes, again, the necessary powers  
 “ were given to the kirk session of the parish joined  
 “ with the heritors, the requisite sums being in the first  
 “ instance leviable from the proprietors and house-  
 “ holders, they having a claim of relief for one half of  
 “ the assessment against their tenants, so far as the  
 “ property was so occupied. Nothing is said, as in  
 “ royal burghs, with regard to the rule or standard by  
 “ which each party was to be assessed; and by a clause,  
 “ to which reference has been made in the proclamation,  
 “ 9th August 1693, the ministers and elders in land-  
 “ ward parishes may determine all questions in their  
 “ respective parishes ‘ in relation to the ordering and  
 “ ‘ disposal of the poor, in so far as not determined by  
 “ ‘ the former laws and acts of the privy council;’ and  
 “ so, as was decided in the case of St. Cuthbert’s, they  
 “ may fix either upon the real or valued rent of the

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ lands, or according to any other rule thought more  
“ consistent with the state of the parish.

“ Upon perusing the whole of these regulations, the  
“ distinction between royal burghs and landward parishes  
“ appears to have been attended to with the utmost  
“ care ; the produce of lands and houses in the one case  
“ being held as the only source of assessment, while in  
“ royal burghs, as enjoying peculiar privileges with  
“ regard to trade and commerce, and where opulent  
“ individuals are to be found, though not proprietors or  
“ leaseholders, the general wealth of the inhabitants is  
“ pointed out as forming one important means of con-  
“ tribution, and, in the case of many of the persons  
“ liable, the only proper standard of it.

“ But throughout the whole regulations no provision  
“ can be discovered for the case of a parish composed  
“ partly of the territory of a royal burgh and partly of  
“ a landward district ; and holding this as *casus impro-*  
“ *visus*, it might be a fit subject of a new enactment ;  
“ on the other hand, if it be reached by the statutes and  
“ regulations already made, when properly explained,  
“ the question would truly be, in what manner, con-  
“ sistent with justice, and for the benefit of all parties,  
“ an assessment could be made, due regard being had  
“ to the statutory regulations in those cases where the  
“ intention of the legislature has been distinctly ex-  
“ pressed.

“ That the rule has not been fixed by determinations  
“ of the courts of law is admitted on all sides, and that  
“ it cannot be ascertained by universal or even general  
“ usage is equally clear. The reports from the town  
“ clerks prove, that in all the parishes which are partly



“ burgal and partly landward, consisting of seventy-six,  
 “ no assessment has yet been raised, unless in fourteen  
 “ cases; and in these the practice is not uniform almost  
 “ in any respect. In some the assessment is levied  
 “ separately in the two divisions of the parish, as in the  
 “ case of Lanark; in others, although the assessment is  
 “ imposed on the whole parish without distinction, it is  
 “ impossible to draw any certain inference from it with-  
 “ out more particular information as to the state of the  
 “ several parishes in respect of population, trade, and  
 “ other circumstances. In some cases, for various causes,  
 “ it may have been of little or no importance what  
 “ should be the rule of assessment; and where the pro-  
 “ prietors in the landward district are liberal and  
 “ wealthy, and in many cases from an anxious desire of  
 “ avoiding a poor’s rate as it is called, which is the  
 “ scourge and disgrace of a neighbouring country, the  
 “ contribution, as it may be called, falling on each indi-  
 “ vidual, bears little or no proportion to that pointed out  
 “ by the law; and although the assessment, being made  
 “ for twelve months, and sometimes for a shorter term,  
 “ it may be varied according to the state of the parish,  
 “ this ought in no case to be done in such a way as to  
 “ affect the immediate relief of the poor, who are enti-  
 “ tled to their maintenance according to the usage, until  
 “ a contrary rule is sanctioned by general agreement, or  
 “ in the courts of law; and I do not see any difficulty  
 “ in making such an arrangement, wherever the parties  
 “ think that some alteration ought to be made; and  
 “ indeed in several instances the course I have now to  
 “ mention appears to have been followed.

“ There being but one kirk session in every parish,  
 “ the members of it may require the attendance of the

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.

10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ heritors in the landward district, and of the magis-  
 “ trates of the royal burgh, as representing the com-  
 “ munity, while no person who has a peculiar or adverse  
 “ interest should be excluded from attending. The  
 “ number of the poor, and what is necessary for their  
 “ support, will be the first objects of attention, and for  
 “ these purposes a joint and general meeting in all cases  
 “ seems indispensable; and thus the comparative popu-  
 “ lation in the two districts, and what is required for an  
 “ adequate support of the poor, will be properly ascer-  
 “ tained from the state of the parish. There may be  
 “ little difference in the result, whether the assessment  
 “ is to be general or separate, or by mutual concessions;  
 “ some equitable medium may be adopted; but to fix  
 “ one and the same standard, in a case like this, through-  
 “ out the parish, in the manner here proposed, and still  
 “ more, without any proof, to limit the proportion to be  
 “ paid either in the landward or the burgh to one third,  
 “ or any other proportion, more or less, seems quite  
 “ incorrect and contrary to law. On the one hand, the  
 “ assessment in part would thus be imposed on the  
 “ heritors and householders of the landward district,  
 “ without affording to them their relief against their  
 “ tenants, if they have any; è contra, the proprietor or  
 “ householder within burgh would have relief against  
 “ his tenants, for which there is no authority in any of  
 “ the enactments; and in fine, if the rule hitherto  
 “ adopted by the magistrates of Lanark were to be  
 “ followed, the inhabitants, as distinguished from  
 “ proprietors and householders, would be altoge-  
 “ ther exempted, although in many cases much more  
 “ able to bear the burden than any of their fellow  
 “ citizens.

“ As to the application of the sums contributed at the  
 “ church doors and otherwise, the presumption is that  
 “ they were intended for the general relief of the poor  
 “ in the parish ; and therefore, if it had not been other-  
 “ wise particularly ordered, as long as they exist they  
 “ would be distributed according to the wants of the  
 “ poor in both divisions of the parish ; but if there be  
 “ a continued and permanent poor’s rate established,  
 “ by which the necessary supplies are provided for,  
 “ few or no contributions can be expected, and those  
 “ who are truly charitable will, as is often done, and  
 “ with great effect, bestow their aid upon persons  
 “ particularly known to them by their merits or mis-  
 “ fortunes.

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.  
 —  
 10th Apr. 1835.

“ Something has been said of the hardship which  
 “ would be imposed upon the inhabitants of the burgh,  
 “ according to the rule of assessment which has been  
 “ suggested, those in necessitous circumstances being to  
 “ be found in greater numbers, and to be supported at  
 “ a greater expence in the burgh than in the landward  
 “ district. But, 1. No pauper is entitled to aid within  
 “ the burgh if he has not resided in it for three years  
 “ preceding poverty. 2. The same principle would  
 “ have been applied to a parish wholly burghal, but  
 “ surrounded as it must be by rural parishes, in many  
 “ cases, of greater population and wealth ; and 3. It  
 “ has been shown, that an amalgamation of the two  
 “ districts, such as has been suggested, could not in any  
 “ case be listened to, without an open and avowed  
 “ breach of the law as it now stands.”

In the present case his Lordship gave this opinion :—  
 “ We have here a summons containing declaratory con-  
 “ clusions, and have an opportunity, without disturbing

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ the interim possession, to decide in what manner in  
“ the parish of Dunbar the assessment for the support  
“ of the poor is to be imposed and levied.

“ The state of the parish has not been very clearly  
“ given. That there is a considerable part of it with-  
“ out the territory of the burgh is not disputed ; and,  
“ for time past all memory, those residing within the  
“ landward district have been considered as having a  
“ separate and independent interest with regard to such  
“ assessments. The total population at one time ex-  
“ ceeded 5,000 ; at this time it is rather less, but at all  
“ times the greater number have resided within the  
“ burgh, although it is said that many have gone thither  
“ after having become poor in the landward district.  
“ The annual assessment varies from 400*l.* to 500*l.* ;  
“ and besides there is a sum of 15,000 merks Scots,  
“ which had been bequeathed for the aid of the poor  
“ within burgh ; also the produce of the mortcloths used  
“ in the parish, and the contributions at the church  
“ doors, which are divided equally between the poor in  
“ the burgh and those in the landward district. It is  
“ said that paupers residing in the burgh are per-  
“ mitted to beg within the territory ; but that appears  
“ to be an improper practice, and ought to be dis-  
“ continued.

“ It is not disputed that, in 1724, an agreement was  
“ made between the magistrates of the burgh and the  
“ proprietors in the rural part of the parish, by which  
“ one sixth only of the necessary assessment was to be  
“ defrayed by the former, and the remaining five sixth  
“ parts by the latter. The writing to which both par-  
“ ties refer bears, that the assessment was to be for one  
“ year only, and that it should not be binding for more

“ than the year, nor held as a precedent in any manner  
 “ of way for the future ; but so far as can be discovered,  
 “ the same rate of assessment has been followed till  
 “ lately.

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.

10th Apr. 1835.

“ In this manner two points have been raised :—  
 “ 1. Whether the rule or standard of assessment thus  
 “ consented to was agreeable to law, and such as might  
 “ be introduced at this time in similar circumstances?  
 “ and—2dly. Whether, in consequence of the practice  
 “ and usage as above described, the rule has become ab-  
 “ solute and unalterable ?

“ And, 1st. If it were to be held that the case of  
 “ parishes partly burghal and partly landward had not  
 “ been provided for by any of the Scots enactments or  
 “ proclamations by the privy council in Scotland, it does  
 “ not readily occur how such an agreement could be  
 “ obligatory or effectual, unless perhaps upon those who  
 “ had voluntarily acceded to it. The case would be the  
 “ same as if an agreement of the same import had been  
 “ entered into between two separate parishes ; nor  
 “ would this be the subject of much regret, the magis-  
 “ trates of royal burghs having all the necessary powers  
 “ with regard to the poor within the territory, while the  
 “ kirk session of the parish, together with the proprietors  
 “ in the landward district, may, unless within the terri-  
 “ tory of the burgh, exercise the same authority. In  
 “ this way too the complaint which has been made of  
 “ persons becoming poor in the landward district and  
 “ then retiring to the burgh for support would be re-  
 “ moved ; but indeed, holding the competency of one  
 “ assessment for the two districts, although separately  
 “ levied and distributed, there seems to be no doubt  
 “ that the burden of supporting those individuals,

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ who, after having acquired a settlement in the land-  
“ ward district, have become poor, and choose to re-  
“ move to the burgh, would remain as before, and  
“ without regard to their residing in the burgh or  
“ elsewhere.

“ But 2dly. And supposing that, by a large and liberal  
“ construction of the different regulations with regard to  
“ the poor, the magistrates of the burgh and the kirk  
“ session and heritors of the landward district could  
“ together and at the same time ascertain the number  
“ of the poor in the parish requiring aid, and levy the  
“ necessary assessments in the two districts, in the man-  
“ ner suggested, it humbly appears that the poor in the  
“ two districts are not to be supported from the same  
“ funds, but separately, and from the funds proper to  
“ each. While the assessment in the landward district  
“ may be raised either according to the real or the  
“ valued rent, or by any other rule for the general ad-  
“ vantage, what is required for the poor within burgh  
“ is to be levied from the inhabitants generally, so far  
“ as they are able to pay, and in proportion to their  
“ ability ; and in no possible case can an assessment be  
“ enforced, which has no reference to any of these  
“ standards, but rests upon the caprice and pleasure of  
“ a joint meeting of the kirk session, the heritors of the  
“ landward district, together with the magistrates of the  
“ burgh. It is possible that a payment of one sixth  
“ part of the assessment out of one of the divisions, and  
“ of the remaining five sixths out of the other division,  
“ might be the same which would be exigible if the legal  
“ rules of assessment were adhered to in due form ; but  
“ to adopt such a proportion, or any other, without re-  
“ ference to any of the legal standards, and still more,

“ as in the present case, in direct and professed opposi-  
 “ tion to them, appears, with great deference, altogether  
 “ inadmissible.

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.

10th Apr. 1835.

“ Here our attention is to be called, not so much  
 “ to the mode or form in which the assessment is  
 “ to be carried on, as to the rate of assessment for  
 “ which each individual or the individuals of a cer-  
 “ tain portion of the parish are to be made liable.  
 “ According to the pursuers’ statement, the poor in  
 “ the burgh are to those in the landward district as  
 “ eighty to forty or thereabouts; and on all hands it is  
 “ agreed, that the poor in the burgh have always ex-  
 “ ceeded those in the country part of the parish. In  
 “ these circumstances, unless in consequence of an  
 “ express consent given to a particular assessment,  
 “ it seems impossible to discover in what manner, in  
 “ such a case as this, instead of paying less than the  
 “ inhabitants of the burgh, as they ought to do, those  
 “ in the landward district should be rated for five  
 “ sixths of the whole assessment; and yet to this result  
 “ the plea on the part of the defenders does necessarily  
 “ come.

“ Still, however, the question remains, how far, in  
 “ opposition to the practice or usage subsequent to  
 “ 1724, the pursuers can be permitted at this time to  
 “ propose a different assessment? And on this point I  
 “ can see no doubt or difficulty.

“ In such a case, the defenders cannot raise a plea of  
 “ prescriptive right; it is not in the power of an indi-  
 “ vidual, or of a corporation, to raise such a plea in op-  
 “ position to the public law, unless where the practice  
 “ is such as to do away the law itself. It has been  
 “ shown that in about seventy parishes, consisting of a

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.  
—  
10th Apr. 1835.

“ royal burgh with a landward district, only fourteen  
“ have been subjected to an assessment for the poor ;  
“ while with regard to some of these a distinct assess-  
“ ment has been imposed in the two divisions of the  
“ parish ; and from the nature of the assessment, as  
“ authorized by law, no certain or invariable rule can  
“ be formed.

“ The assessments for the poor do not form a real  
“ burden on the lands in the parish ; they do not  
“ even, like tithes, affect the rents or produce of the  
“ lands for the assessment that is then exigible. The  
“ obligation imposed upon the individuals in the parish  
“ is altogether of a personal nature, and depending upon  
“ his condition and circumstances at the time. In addi-  
“ tion to all this, the assessment can only be raised for  
“ one year at a time, or for a shorter period ; and  
“ although, by acquiescence merely, and without any  
“ formal renewal, the same mode of assessment may be  
“ followed for a very long time, this cannot prevent the  
“ parties interested from making any alteration agree-  
“ able to the public law, and just in itself. This was in  
“ terminis decided in the case of the West Church, and  
“ cannot well be disputed.

“ I lay no stress on the declaration inserted in the  
“ agreement in 1724 ; it was quite unnecessary,  
“ although it proves beyond all doubt what the  
“ opinion of the parties was at the time, and it  
“ must be held as forming a part of every after  
“ assessment.

“ Upon the whole, I am humbly of opinion, that the  
“ first conclusion in the present action is well founded ;  
“ and that the pursuers, as heritors of the landward dis-  
“ trict of the parish, with their tenants, are not liable



“ for the support of the poor of the burgh, but for that  
 “ only of the poor having acquired a settlement within  
 “ the landward district.

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.

10th Apr. 1835.

“ There is a separate or alternative conclusion in the  
 “ summons, that if there were to be no separate assess-  
 “ ment in the two divisions of the parish, the heritors,  
 “ provost, minister, and elders, should be authorized to  
 “ make an assessment for the whole aggregate poor, to  
 “ be laid upon the whole inhabitants of the parish  
 “ equally, whether in burgh or landward, and according  
 “ to the estimation of their substance, without exception  
 “ of persons; but it does not occur to me that such a  
 “ determination can be required, and it would not be  
 “ agreeable to law.”

In the Lanark cause, LORDS MACKENZIE and  
 MEDWYN delivered this opinion:—“ While the laws  
 “ enacted in this country for the provision of the poor  
 “ distinguish the two cases of the poor within burgh and  
 “ the poor in country, or, as they are termed, landward  
 “ parishes, there seems to be no enactment applicable to  
 “ the case of a parish consisting of a royal burgh with  
 “ a landward district, not burgage, included within it.  
 “ Throughout the whole series of enactments on this sub-  
 “ ject, the poor, as they belong to a royal burgh, or a  
 “ parish to landward, are contradistinguished, and both  
 “ the persons who are to superintend the poor and ad-  
 “ minister the fund for their support, as well as the  
 “ mode and rule of assessment for raising the fund, are  
 “ different in relation to the two sets of poor. The  
 “ foundation of the whole system is the act 1579,  
 “ c. 74. This act directs the provosts and bailies within  
 “ burghs, and a judge constitute by the king’s commis-  
 “ sion in each parish to landward, to make a catalogue

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ of the names of the poor people, and then, by the  
“ good discretion of the saids provosts, bailies, and judges  
“ in the parishes to landward, ‘ to tax and stent the  
“ ‘ hail inhabitants within the parish, according to the  
“ ‘ estimation of their substance, without exception of  
“ ‘ persons;’ they are also to appoint overseers and  
“ collectors in every burgh, town, and parish, which  
“ shall receive the weekly portion, and ‘ deliver as  
“ ‘ meikle thereof to the saids puir people, and in sik  
“ ‘ manner as the saids provosts, and bailies, and judges  
“ ‘ in the parochin to landwart respectivè sall ordne and  
“ ‘ command.’

“ Thus a distinct line of separation is drawn between  
“ royal burghs and parishes to landward, in regard to  
“ the administration of their respective poor, which is  
“ kept up throughout the whole series of statutes, whether  
“ as to the poor or vagabonds; and it appears never to  
“ be contemplated, that the magistrates within burgh,  
“ or the managers to landward, are to be conjoined in  
“ the management of the poor, or in assessing or dis-  
“ tributing the funds.

“ The only alterations made in this original plan of  
“ our poor laws are, that by 1597, c. 272, the care of  
“ the poor is transferred to each kirk session, ‘ in place  
“ ‘ of several commissions in landward to be granted by  
“ ‘ the king,’ with whom, by the act 1672, c. 18, the  
“ heritors of the parish are conjoined; and that by the  
“ proclamation 11th August 1692 the heritors and  
“ kirk session of landward parishes are to assess them-  
“ selves for support of the poor, and to lay the burden,  
“ the one half upon the heritors, and the other half upon  
“ the householders of the parish, adopting very nearly  
“ the rule for such parishes imposed by 1663, c. 16,

“ for the expence of employing vagabonds and idle  
“ persons.

“ As this proclamation did not apply to royal burghs,  
“ nor to vacant parishes, where of course there was no  
“ kirk session, this omission was supplied by proclama-  
“ tion 29th August 1693, which requires ‘ the magis-  
“ ‘ trates of our burghs royal to meet and stent them-  
“ ‘ selves,’ &c. ; ‘ and the heritors of the several vacant  
“ ‘ parishes to meet and stent themselves for the main-  
“ ‘ tenance of their respective poor.’

“ If the rule of assessment had continued as prescribed  
“ by the act 1579, so that each person paid according  
“ to the estimation of his substance, one difficulty would  
“ have been removed, when it is proposed, in a burgh  
“ with a landward district forming one parish, to make  
“ one roll of poor and one assessment ; and there would  
“ remain only the objection to the different jurisdictions  
“ or managers, under whom the poor, according as they  
“ are within burgh or not, are respectively placed. But  
“ the assessment in a country parish is levied by the  
“ appointment of the heritors and kirk session, half  
“ payable by heritors, conform to the old extent or  
“ valuation, ‘ or otherwise, as the major part of the  
“ ‘ heritors shall agree,’ the other half to be paid by the  
“ tenants and possessors according to their means and  
“ substance ; while the magistrates within burgh stent  
“ the inhabitants in terms of the proclamation 29th  
“ August 1693, ‘ conform to the order and custom used  
“ ‘ and wonted in laying on stents, annuities, and other  
“ ‘ public burdens in the respective burghs, as may be  
“ ‘ most effectual to reach all the inhabitants.’ These  
“ proclamations are ratified by act 1695, c. 43.

“ Thus the magistrates of burghs are to provide for

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.  
—  
10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.  
—  
10th Apr. 1835.

“ the poor under their jurisdiction, and to assess the  
 “ inhabitants for their support, according to certain  
 “ rules from which there is no warrant to deviate ; while  
 “ the heritors and kirk session of a parish to landward  
 “ are to provide for the poor in such parishes by an as-  
 “ sessment regulated on totally different principles. We  
 “ do not find any warrant for authorizing one roll of  
 “ poor in a parish, partly burghal and partly landward, so  
 “ that either the magistrates shall be under the necessity  
 “ of providing for the poor beyond the burgh, or the  
 “ heritors and kirk session for those within burgh ;  
 “ neither do we see that it is ever contemplated that the  
 “ magistrates, heritors, and kirk session are to form one  
 “ body, and provide for the general mass of poor, burghal  
 “ and landward. Further, the magistrates are autho-  
 “ rized to stent in the burgh only, according to the  
 “ estimation of the substance,—a mode by which the  
 “ heritors to landward are not to be assessed ; and on  
 “ the other hand, the heritors and kirk session cannot  
 “ assess the inhabitants of a burgh over whom they have  
 “ no jurisdiction, and those whom they assess they are  
 “ to assess by a rule quite different from the burghal  
 “ mode.

“ If it shall be said, that the proclamation 3d March  
 “ 1698 gives sufficient authority to the Court to regulate  
 “ assessments for the poor in a burgh with a landward  
 “ district, so as to oblige the magistrates, heritors, and  
 “ kirk session to act as one body, and make up a  
 “ single roll of poor to be supported by assessment, we  
 “ are unable to come to that conclusion ; for it seems  
 “ impossible to suppose that it could be the intention of  
 “ the privy council to create such a legislative power  
 “ affecting the inhabitants of royal burghs by instructions

“ addressed only to ‘ the ministers and elders of each  
 “ ‘ parish, with advice of the heritors, or so many of  
 “ ‘ them as shall meet and concur with them,’ and in  
 “ which the magistrates are not so much as mentioned,  
 “ by merely authorizing them ‘ to decide and determine  
 “ ‘ all questions that may arise in the respective parishes  
 “ ‘ in relation to the ordering or disposing of the poor,  
 “ ‘ in so far as it is not determined by the laws and  
 “ ‘ acts of parliament, and the former acts of our privy  
 “ ‘ council ;’ obviously meaning only the ordinary ques-  
 “ tions in the management of that class of poor which  
 “ is already under their charge, so as not however even  
 “ there to run counter to what is established law on the  
 “ subject.

“ Further, supposing there was to be only one roll of  
 “ poor, the difficulty would still remain ; what portion  
 “ of the expence is to be raised by the burgh, and  
 “ what by the landward heritors ? Each by law are  
 “ entitled to be assessed according to a particular rule,  
 “ producing equality of burden among themselves,  
 “ when each class raises a specific sum ; but, if  
 “ extricable at all, great inequality would arise when  
 “ applied to raise a single fund. Neither class is  
 “ bound to give way to the other, so as to adopt the  
 “ same rate of payment over all ; and as to the  
 “ inhabitants within burgh, and the inhabitants in the  
 “ country, they can be legally assessed according to a  
 “ certain specified rule, and no other.

“ It seems to us that the only mode in consistence  
 “ with the rules established for assessments by burghs  
 “ and landward parishes is to hold that the poor  
 “ within burgh are subject to the jurisdiction of the

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.  
 —  
 10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ magistrates, and must be supported by the assessment  
 “ leviable by them from the burghal inhabitants, stented  
 “ according to use and wont; and that the poor to  
 “ landward are to be maintained from the assessment  
 “ upon the heritors and inhabitants under the juris-  
 “ diction of the heritors and kirk session, assessed  
 “ according to the rule in country parishes. This is  
 “ the rule which has hitherto been adopted in Lanark;  
 “ and we see no necessity for change, and no authority  
 “ which the Court has to compel any alteration upon  
 “ it. It is true that in several parishes, nay in most,  
 “ similarly situated as Lanark is, the difficulty has been  
 “ solved by a special agreement, by which there is but  
 “ one roll of poor, for whom the burgh and landward  
 “ portion of the parish contribute in certain fixed  
 “ proportions, differing according to the circumstances  
 “ of each case. But this is entirely a matter of special  
 “ agreement; and we think it is beyond the power of the  
 “ Court to compel those who are unwilling to adopt  
 “ any such rule. Further, we think that the case of the  
 “ West Kirk parish, Scott against Fraser, 19th January  
 “ 1773, is inapplicable; because there was no royal  
 “ burgh there entitled to a peculiar mode of assessment,  
 “ and a jurisdiction distinct from the heritors and kirk  
 “ session. Burghs of barony have never been recog-  
 “ nised as having any such privilege in this matter of  
 “ the poor, and they are treated as landward parishes,  
 “ both as to the jurisdiction of the heritors and kirk  
 “ session, and the mode of assessment, which, as to the  
 “ heritors’ quota at least, may be by the old extent, the  
 “ valuation in the cess-books, ‘or otherwise as the major  
 “ ‘part of the heritors shall agree;’ and accordingly

“ the Court confirmed the resolutions of the majority,  
 “ that the assessment there should be according to the  
 “ real rent.

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.

10th Apr. 1835.

“ As to the collections at the church door, if the  
 “ magistrates, and heritors, and kirk session respec-  
 “ tively do not agree about the proportion in which  
 “ they are to be divided, as it is impossible to know in  
 “ what proportion the attenders at church from the  
 “ burgh or landward portion of the parish respectively  
 “ contribute to the funds, we are of opinion that the only  
 “ rule of division which can be recommended is, that  
 “ the quota set apart for the poor should be divided in  
 “ proportion to the amount levied upon each portion  
 “ of the parish respectively.”

In the present case their Lordships delivered this  
 opinion: — “ We remain of the opinion we gave in the  
 “ case of Lanark, that there is no warrant in our sta-  
 “ tutory system of poor laws for imposing upon the  
 “ landward part of a parish, in which there is a royal  
 “ burgh, the burden of contributing to the maintenance  
 “ of the poor who have a legal claim to parochial relief  
 “ as residents within burgh. Our reasons for this  
 “ opinion we have given in that case, to which we beg  
 “ to refer.

“ The present is so far different, that while, in the  
 “ case of Lanark, the management of the poor, as they  
 “ were locally situated within the burgh or the landward  
 “ district of the parish, had always been separately pro-  
 “ vided for,—those within burgh by the magistrates, as  
 “ representing the community, and those resident in the  
 “ rest of the parish by the landward heritors,—here there  
 “ seems to have been an agreement entered into between  
 “ the magistrates of Dunbar and the landward heritors

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ in 1724, by which a joint arrangement was agreed to  
“ ‘ for the year ensuing allenarly,’ with a special clause,  
“ that ‘ this should not be drawn into a precedent in  
“ ‘ any time coming.’ The agreement was that the  
“ burgh was to pay one sixth, and the landward heri-  
“ tors five sixths, of the assessment for the poor.

“ There is no evidence as to future years, till the year  
“ 1774, since which time this same proportion has been  
“ paid. We do not think that this usage, guarded more  
“ especially as it was at the commencement by the ex-  
“ press stipulation that it should not form a precedent  
“ any manner of way for the future, can bind the land-  
“ ward heritors, so as to compel them to continue it  
“ longer than they think it expedient. We are of opi-  
“ nion, that the agreement was entirely voluntary at the  
“ time; that, if not contrary to the law, it was at least  
“ not supported by the law; and that the heritors who  
“ entered into it, and those in succession who conformed  
“ to it, have not bound the present heritors to the con-  
“ tinuance of a practice commenced under the proviso  
“ here so anxiously introduced.

“ We are therefore of opinion, that decree should be  
“ given in favour of the pursuers, in terms of the first  
“ alternative conclusion of the summons.”

On these opinions being communicated to their Lord-  
ships of the Second Division, they delivered their opi-  
nions orally, of which the following notes were laid  
before the House of Lords as embracing the substance  
of them :—

“ LORD JUSTICE CLERK :—Six of the consulted judges  
“ are of opinion, that the usage ought to fix the rule of  
“ assessment in the burghs of Lanark and Dunbar;  
“ the other three judges who were consulted, have de-



“livered a different opinion, founded entirely upon the  
 “interpretation of the statutes which ordain an assess-  
 “ment for the maintenance of the poor. With these  
 “conflicting opinions before me, I have given the point  
 “the fullest consideration; and, after having weighed  
 “all the arguments for and against, I must confess that  
 “my opinion coincides with that of the minority. I  
 “cannot discover on what principle usage can or ought  
 “to be introduced as the rule of the assessment. The  
 “provision for the poor, and the powers to impose the  
 “assessment are the mere creations of statute. There  
 “is here no case of very ancient usage. But although  
 “the usage had been long and inveterate, I can see no  
 “ground for deciding that it is to be imperative or  
 “binding on the parties liable to an assessment. The  
 “usage may continue from generation to generation—  
 “it may go on from century to century—the country  
 “may not complain of the usage, and the assessment  
 “may be imposed and levied for a long time undis-  
 “turbed; but when any one becomes refractory, and  
 “calls in question the right or mode of assessment, we  
 “must recur to the statute. It is admitted, that the  
 “common law here is out of the question; hence the  
 “question is narrowed to this, whether the assessment  
 “has been imposed under the provisions of the statute?  
 “No usage will be sufficient. But even if this were a  
 “question of usage, we would have to consider whether  
 “the usage of one hundred years should be the rule, or  
 “merely the usage since 1814? The latter usage, in  
 “the case of Lanark, I look upon as a direct violation  
 “of the law: for example, there is a provision with  
 “regard to mortified funds, that the capital is not to  
 “be touched, and yet the provision has been disre-

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.  
 —  
 10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ garded. It is said that this cannot operate against the  
 “ principle of usage ; but in my view of the question,  
 “ usage, however continuous, establishes no right. In  
 “ this state of matters we are just driven back to con-  
 “ sider the first question, which is, What is the state of  
 “ the law under the statute with regard to a mixed  
 “ parish ? The enactments relate to two different sets  
 “ of poor, and to two distinct localities,—a royal burgh  
 “ and a parish to landward. In the case of a burgh,  
 “ the rule applies to every burgh which has a provost  
 “ and magistrates. This is the clear provision of the  
 “ act 1579 ; and here I must remark, that I cannot  
 “ join in an obiter opinion, which is said to have been  
 “ expressed by Lord Corehouse at the advising of the  
 “ case of Parker ; viz. that all the statutes have been  
 “ done away with, and that we are to look for the law  
 “ in the proclamations alone. I can find no trace of  
 “ authority for such an opinion. On the contrary, are  
 “ we not in the practice every day of entertaining decla-  
 “ rators in which it is implied that the act 1579 is still  
 “ in observance ? We might just as well put the four  
 “ proclamations in the fire as the act 1579. It, as well  
 “ as the proclamations, are recited in the statute of 1698 ;  
 “ and in truth the act 1579 is the very origin and basis  
 “ of our system of poor laws. It lays down a clear  
 “ code of regulations, both for the burghs and the land-  
 “ ward parishes. The burghs are those which have a  
 “ provost and magistrates, no matter how many parishes  
 “ they are divided into. A distinct mode of assessment  
 “ for the poor is provided by it. It provides how the  
 “ lists are to be made up—it contains certain regula-  
 “ tions as to begging — and it clearly defines the manage-  
 “ ment by the magistrates. As to a parish to landward

“ the act confides the power of assessment to a judge  
 “ constituted by the King’s commission; but this was  
 “ afterwards so far altered, that the powers and duty of  
 “ the judge were devolved on the heritors and kirk  
 “ session by 1597 and 1672. Then again we have, on  
 “ the one hand, the proclamation of 1692, by which the  
 “ heritors and kirk session of landward parishes are to  
 “ assess themselves for the support of the poor; and on  
 “ the other hand, the proclamation of 1693, by which  
 “ the magistrates of the burghs are empowered and  
 “ required to impose the assessment; so that it appears  
 “ to me there is a clear distinction between the poor  
 “ themselves—the assessments—the management of the  
 “ funds—and the provisions for the maintenance of the  
 “ poor. With regard to the burghs, the rule extends  
 “ to all royal burghs, whether they have any landward  
 “ territory or not. I make this remark in passing, be-  
 “ cause there are one or two burghs without territory,  
 “ as Queenferry for example; but the words are exten-  
 “ sive and comprehensive enough to include all royal  
 “ burghs. As to all royal burghs this is the rule,  
 “ although it is not so with the burghs of barony, which  
 “ are in this question to be treated as villages. There  
 “ is no express notice in the statutes or proclamations  
 “ of, nor are there any provisions for mixed parishes;  
 “ they apply to the poor of the burgh and the poor of  
 “ the landward parishes respectively. To me it is plain  
 “ that they lay down two systems of management which  
 “ are quite distinct. When a usage has been estab-  
 “ lished, it may be convenient to follow it; but when-  
 “ ever a question is stirred as to the matter of right, we  
 “ must give effect to the law as we find it. We must,  
 “ in this case, steer by the law as we find it in the

THE  
 MAGISTRATES  
 OF DUNBAR  
 v.  
 THE HERITORS  
 OF DUNBAR.  
 —  
 10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ statutes and proclamations. We have no right to  
 “ deviate from the provisions of the law to meet a par-  
 “ ticular case; nor do I see that usage can supply the  
 “ want. It might be desirable that a settlement were  
 “ effected, and I should be happy to hear, that the  
 “ parties were to withdraw their opposition, and adjust  
 “ matters; but mere usage in a case of this kind is not  
 “ sufficient to create a law for the community. It may  
 “ be submitted to for a time. But there are cases  
 “ where, from the increase of population and other  
 “ causes,—as in the case of the West Kirk parish,—it  
 “ is of extreme importance to ascertain the right by  
 “ which a compulsory assessment is to be regulated. In  
 “ such cases we must just look to the law by which the  
 “ assessment is authorized. I would only further re-  
 “ mark, that the usage of which we have any evidence  
 “ is in general very unsatisfactory. From the report  
 “ made in Parker’s case, it appears, that three burghs  
 “ follow one usage, three another, and three a third.  
 “ From such a usage it is impossible to elicit any thing  
 “ like a general principle. There is an utter vagueness  
 “ in it; a remark which holds good, particularly in  
 “ regard to that of which the evidence is now before us;  
 “ so much so, that it cannot even regulate the particular  
 “ cases. The usage of one burgh cannot establish a  
 “ law for other burghs. The statutes and proclama-  
 “ tions must rule. I am therefore of opinion with the  
 “ minority, and would propose, in regard to Dunbar,  
 “ to find in terms of the first conclusion of declarator.  
 “ As to Lanark, it is clear the woman must be sup-  
 “ ported; and as she belongs to the burgh, we should  
 “ dismiss the one advocacy, and in the other remit to  
 “ the magistrates to maintain her, according to law.

“ *Lord Meadowbank*.—I am of the same opinion.

“ *Lord Cringletie*.—I agree.

“ *Lord Glenlee*.—I also agree.

“ *Lord Justice Clerk*.—There being six of one opinion,  
“ and seven of another opinion, we accordingly decern  
“ by the majority in the first conclusion of the decla-  
“ rator.”

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

The Court accordingly, on the 4th of July 1833, de-  
cerned and declared in terms of the first conclusion of  
the summons, thereby finding “ that the management  
“ and maintenance of the poor of the landward district  
“ and of the burgh are separate and distinct, and that  
“ the pursuers, as heritors of the landward district, with  
“ their tenants, and other inhabitants thereof, are not  
“ liable for the support of the poor of the burgh, but for  
“ that of the poor resident within the landward district  
“ allenary; and the said provost, magistrates, and  
“ council, as representing the community of the said  
“ burgh of Dunbar, ought and should be decerned and  
“ ordained, by decree foresaid, to sustain and manage  
“ the poor of the said burgh according to law.” A  
judgment to a similar effect was at the same time pro-  
nounced in the Lanark cause.\*

A farther interlocutor was pronounced, finding it un-  
necessary to decide upon the alternative conclusion, and  
of consent assoilzieing the Magistrates from the conclu-  
sion for repetition.

The Magistrates appealed.†

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\* 11 S. D. B. p. 879.

† It is stated in the case for the respondents, that, on the judgments  
above mentioned being pronounced, applications were made both by the  
magistrates of Lanark and by those of Dunbar, to have their respective  
causes taken to appeal; and on considering these, the Convention of 1833  
determined to take the appeal in the present cause; but the appellants

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.  
—  
10th Apr. 1835.

*Appellants.*—The law of Scotland relative to the maintenance of the poor proceeds entirely upon a parochial system, the whole poor within each parish forming one class to be provided for indiscriminately out of the whole funds of the parish. There is nothing in the

having failed to lodge their case in terms of the standing orders of the House, their appeal consequently fell.

The respondents thereupon obtained a certificate of dismissal of the appeal, and extracted the decree of the Court of Session; and they gave notice to the appellants that they would proceed to charge them for implement thereof, unless some arrangement were gone into for regulating the interim management; so that if the appellants should not revive their appeal, or if the judgment of the Court of Session should be affirmed, the respondents might have the benefit thereof from its date.

An arrangement was accordingly entered into between the appellants and respondents, whereby the latter agreed to assess themselves for the whole poor as formerly, on the condition, that, should the judgment be affirmed, the appellants should “make good to the heritors the difference” betwixt the assessment levied according to the old system, and the “burden as fixed by the decision of the Court.”

With the view of determining what this difference would be, a committee of the heritors was appointed, who, in conjunction with a similar committee of the magistrates and kirk session, made a thorough investigation of the roll of paupers, ascertaining which belonged to the burgh, and which to the landward parish.

The result of this investigation, made at the sight of, and to the conviction of both parties, has been as follows:—

Total number of paupers in burgh and to landward	-	-	103
<hr/>			
Of these — have a settlement in the burgh	-	-	86
ditto in the landward parish	-	-	17
<hr/>			
			103
<hr/>			
It was further ascertained, that of these 103 paupers there were			
Born and brought up in the burgh	-	-	50
Ditto in the landward parish	-	-	10
Immigrated from other parishes	-	-	43
<hr/>			
			103
<hr/>			

An assessment was accordingly imposed as formerly, but under the condition stated, that should the judgment be affirmed the landward parish should be relieved of all burden, except for the maintenance of the seventeen paupers settled in the landward parish.

Thereafter the appellants presented a new petition, and had their appeal revived of this date, the respondents consenting thereto.

statutory enactments, upon which alone the poor law is founded, either in ordinary construction, or as they have been explained by usage, which sanctions in any case the division of the poor of one parish into separate and distinct territorial classes — such as the burgh poor and the landward poor in the case of a parish partly burghal and partly landward, — or authorises the formation of a separate list or roll of paupers to be made up with reference to such territorial division, — or directs provision to be made for their maintenance out of distinct and separate funds.

Although a distinction has been introduced between parishes formed entirely of a royal burgh, and parishes entirely landward, with reference to the mode of imposing and levying the assessment, and the parties liable to be assessed, there is not, through the whole series of the statutory enactments on this subject, including the proclamations, any clause in which the maintenance of the poor is ever considered except with reference to a parochial arrangement. The establishment of a magistracy in a burgh royal may have afforded certain facilities for the explication of the system there; and the circumstances of such a burgh, with respect to the condition of its inhabitants, and the nature of the property they possess, may have appeared to justify or require a different mode of assessment and principle and rate of liability, where a parish is entirely within the town, from that which suggested itself in the case of a parish entirely landward. Any difference of arrangement, however, depending upon such peculiarities, forms only a subordinate part of the system; it forms not even an exception from the system as a proper parochial system. On the contrary, it proceeds upon the ground that every

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.  
—  
10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR

v.

THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

parish is to support its own poor, introducing only a special arrangement for furnishing that support, where a royal burgh, containing a magistracy, of itself forms a parish. Nothing that is said about the powers of magistrates within burgh, in regulating the maintenance of the poor, as contradistinguished from the powers vested in the heritors and kirk session and justices of the peace and sheriffs, does in any view trench upon the leading feature of the system, that the poor laws, so far as regards the territorial division of the parties entitled to relief, and of the parties bound to furnish it, rests entirely upon and follows the division of the country into parishes.

The leading principle upon which the poor laws of Scotland proceed is that the poor of each parish shall be relieved by funds derived from voluntary contributions at the parish church, mortifications, &c., and, in aid of these funds, by a parochial assessment within each parish respectively. Whether the question be considered with reference to the law of settlement — to the funds and parties liable for the paupers' maintenance — to claims of repetition and relief at the instance of those who, though not truly liable, may have given interim support, — to the law of removal even, in so far as that law has obtained in Scotland, there is nothing but a parochial system.

The doctrine of the respondents would lead to the most absurd and impracticable results. Suppose a party to claim aliment after having resided, first two years in the burgh, and then two years in the landward part of the parish, it is clear that he is chargeable against the parish, to the relief of the parish of any former settlement. But the respondents say that his maintenance is



a burden, not upon the whole parish generally, but upon the one or the other district. If so, which district shall be liable in the case supposed? He has not finished a sufficient period of residence in either.

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835

Again, suppose that, before becoming chargeable, he had resided for two years and a half in the burgh, and for the last six or seven months in the landward district, or vice versâ. Here there is a clear liability against the parish; because, as regards the whole parish, the settlement is complete. But, according to the respondents' scheme of subdividing the parish, there is no settlement acquired in either district.

So take the case of removal; although the law of Scotland does not permit removal on the mere ground that a party may become chargeable to the parish, unless he has begun to beg, or has become chargeable; yet even this limited power has, like all the rest of the law on this subject, been administered on the principle of parochial system. It is a removal from parish to parish. No one ever heard of such a thing as a removal from one district of a parish to another. Removal, like every other part of the poor laws, proceeds on the supposition of settlement. It is the removal of a party who has become a pauper, and is so chargeable, to the proper parish of his settlement.

The practice throughout Scotland, and in this very parish, has also uniformly taken place on the principle of a parochial system, and not on a subdivision of parishes. This is proved by the Reports as to the practice ordered by the Court below in the case of *Buchanan v. Parker*, 21st February 1827.\*

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\* See 5 S. D. p. 362, new edition; and p. 390, old edition. The reports will be found at p. 364 of the new edition.

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

No difficulty has hitherto arisen as to the administration of the poor laws in the cases like the present, of which many exist; if any dispute arise the Court of Session is entitled to decide and to regulate the matter. This was done in the case of *Scott v. Fraser*.\*

Analogy is also in favour of the appellants' principle of a parochial system, and adverse to that of the respondents. In the case of *Peterhead*, relative to the building of a church, the Lord Chancellor Eldon, in moving judgment in this House said, that "the expence of building or repairing a parish church was a parochial burden, which ought to fall on the property of the parish, and should not be regulated by reference to the population in different parts of the same parish,"—adding, that the case of *Crieff*, in which the last rule had been introduced, had been recently pronounced, and was no authority in the case of *Peterhead*, to determine which, therefore, it was necessary to resort to principle. In this opinion, Lord Thurlow is stated to have concurred.†

Apply that decision and its principle to the present case. The respondents cannot make out here nearly so strong a case for apportioning the burden in the ratio of the population as existed in the parish of *Peterhead*; because here there are the various and insuperable difficulties pointed out, connected with the law of settlement and removal and with the rights of the claimants upon the parish funds as a common source of relief, none of which occurred as to the building of the church. The very same general ground, therefore, which rejected the

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\* 19 Jan. 1773, Mor. 10,577, Hailes, 522.

† Connell's Supplement to a Treatise on the Law of Parishes, p. 25.

ratio of the population in the case of Peterhead should equally lead to its rejection here. The support of the whole poor of the parish is one common burden, to be borne by the whole parish; but the rate at which the parish is to be assessed, is not in proportion to the poor who may happen to reside in one particular part of the parish; for such a rate of assessment would end in this, that each separate property should maintain its own poor, there being no reason for stopping such a subdivision if it is once commenced.

*Respondents.*—Compulsory assessment for support of the poor rests entirely on statutory enactment, and can neither be extended beyond, nor exercised differently from what is prescribed, by the statutes and ratified proclamations authorizing the same. By these statutes and proclamations, the management and maintenance of the poor of royal burghs is totally distinct and separate from that of the landward portion of the parish in which the burgh is situated. Accordingly, express provision is made for the maintenance and management of the poor of all royal burghs under the exclusive jurisdiction of their own magistrates, separately and distinctly, without reference to any landward district not within the burgh. In like manner express provision is made for the separate maintenance and management of the poor of landward parishes having a royal burgh situated therein, under the exclusive jurisdiction of the heritors and kirk session, independent of such burgh. Indeed a conjoint management and system of maintenance of the poor of the landward district and royal burgh is not only unsanctioned by the statutes and proclamations, but cannot be carried into effect without a direct and open violation of all their most important provisions. While the system

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1895.

for the support of the poor is, in so far as regards the landward parts of the country, parochial, that system, in so far as regards the royal burghs, is strictly and exclusively burghal in all its parts,—in its machinery, its rules of assessment, and in its extent; comprehending and extending over the whole burgh, although it contains several separate parishes, and limited to the bounds of the burgh when it is situated within a parish. On the other hand, although the landward districts of parishes containing royal burghs are included under the provisions in the statutes regarding landward parishes, yet the royal burghs are excerpted therefrom, and are erected into separate districts relative to the poor, under a management peculiar to themselves, and exclusive of the landward parish. No general consuetude can affect the construction of the statutes as to this matter, and no length of usage in a particular place can prevent the heritors and kirk session of a parish, or the magistrates of a burgh, from reverting even from one legal mode of assessing for, and maintaining the poor, to another; and still less can it prevent them from turning from an illegal mode to one sanctioned by law.

The fallacy into which the appellants have fallen, and which has been adopted by the learned judges in the minority, is in considering the statutory system of provision for the poor to be exclusively “parochial.” This is shown to be a fallacy from the circumstance that when a burgh is divided into several parishes, it still remains one district quoad the poor. If, however, the doctrine of the appellants were correct, it would necessarily follow, that wherever a burgh was divided into separate parishes, the poor of each parish must be separately maintained. In Edinburgh there are thirteen

parishes, and though some of them, having been erected by the Church Courts only, may be considered as separate parishes only quoad sacra, others were erected in early periods by the Privy Council, which exercised a civil jurisdiction in such matters; and those more recently erected were so erected by virtue of acts of parliament, and of course constituted parishes quoad civilia. In Glasgow, again, several of the parishes were erected by the Teind Court; and in Dundee, Perth, and other burghs, there are also distinct parishes quoad civilia. It never was however imagined, that these burghs were to be divided into separate districts as to the maintenance and management of the poor; that there was to be a separate assessment for the separate parishes; or that a pauper residing two years in one parish, and a third in another, but still within the burgh, did not acquire a settlement therein, as not having resided three years in any one parish. On the contrary, the whole poor of the burgh, as one separate and distinct, but purely burghal, district, are indiscriminately held to acquire a settlement by residence within the burgh, though never two years in the same parish, and are maintained by one general assessment over all the inhabitants, without the slightest regard to the parochial divisions in which they live.

On the other hand, when towns, not being royal burghs, are divided into separate parishes, the management and maintenance of the poor becomes also separate; and so in the town of Greenock, which had been divided into two parishes by the Court of Teinds, and a separate management thereby introduced, when it was deemed expedient to revert to a general management, an act of parliament was necessary to unite, quoad the poor, the parishes which had been so erected.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

The reason of this difference is plain. It is only royal burghs that are held to be included under the provisions as to burghs in the statutes regarding the poor. Other towns are not erected, as to this matter, into separate districts, and subjected to a burghal management, but remain subject to a parochial management, being in the eye of the law landward in their character, and still parts of a landward parish. The proprietors in such towns, therefore, are still deemed heritors. The magistrates have no powers as to the management of the poor, which is vested exclusively in the heritors or proprietors, and elders, whether in the town or country district; and when such a town is divided into two parishes, the system being strictly parochial, there is thereafter a complete separation between the parishes into which it has been divided.

The contrast as to royal burghs is very striking, and arises necessarily from the peculiarity, that they have been, by the statutes relative to the poor, erected into separate districts as to that matter, not parochial, but purely and exclusively burghal, so as on the one hand to be limited to the burgh, although the parish may be more extensive, and on the other to be extended over the whole burgh, although it may consist of several separate and independent parishes.

No inconvenience therefore, or confusion, can ever arise as to the rights of parishes belonging to the landward or burghal district, any more than in regard to two entirely separate or distinct parishes.

Then, as to general usage there is nothing of the kind. From the returns in Parker's case, it appears that there are only nine burghs which can be appealed to in proof of usage at all. Of these, there are three in which the

burgh and the landward parish are treated in all respects as separate and distinct parishes, according to the rule contended for by the respondents; three in which they are treated entirely and in all respects as one parish; and three, including Dunbar, where they are treated as one parish quoad the distribution of the fund, and are sub-divided into subordinate districts as to the rule of imposing the assessment. There is no ground, therefore, for allowing the matter of usage to affect the decision of the general question, to determine which purely, and without specialty, the present appeal has been expressly taken.

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.  
—  
10th Apr. 1835.

LORD BROUGHAM.—The parish of Dunbar, which is of great extent, consists of the royal burgh of that name, and a country or landward district. The population of the burgh is about 3,200, and of the landward part nearly 1,700. The management of the poor is admitted to have been for above a century on its present footing; and there is no evidence of any other kind of management at any time. Both parts of the parish, the burgh and landward district, have been considered as one, without any division or difference of system, or any separation. There has been but one assessment paid from the whole parish, and no distinction has been made of the poor into two classes or parties,—the burgh poor, and the landward poor; nor has any separate list or roll been ever made up of the rate classes. The one sum assessed having been each time ascertained, the usage has been to distribute it into two portions; one sixth to be levied in the burgh, and five sixths in the landward parish; but when received, the whole has been uniformly treated as one fund, and distributed as such among the whole

**E**  
**THE MAGIST**  
**OF DUNBAR**  
**v.**  
**THE HERITORS**  
**OF DUNBAR.**

10th Apr. 1835.

poor without any distinction. In like manner, the kirk-door collection has been one for the whole; and in all questions of settlement a distinction has never been made between the two parts of the parish. There is some discrepancy between the statements of the parties as to the proportions of the poor in the burgh and in the landward part. The one states the burgh poor at 70, and the landward at 30 per cent.; the other gives these numbers as 60 and 40 per cent. But it is clear that the numbers of poor actually residing within the burgh must be any thing rather than a fair criterion of the proportions of persons thrown upon the parish funds by the two districts; for many of the poor who now live in the burgh are labourers formerly employed in the country, while many of the persons at all times working in the country are resident in the burgh. It is accordingly stated, and I do not find this explicitly denied, that nearly one half, certainly more than a third, of the poor residing in the burgh, were formerly country labourers, independently of those who always lived in the burgh, while working in the landward part. In these circumstances, which compose the whole facts of the case, the respondents, who are the heritors of the parish, naturally enough felt desirous, if they could, to shift upon the burgh the maintenance of its own poor, reckoning all to be burgh poor who reside within its bounds, although a great number of them belong properly to the country district. This desire they have in common with every part of a district which has a population of varying density, and a wealth distributed in proportions not at all relative to the numbers of inhabitants. There are many parishes in which eight or ten thousand persons are crowded into one corner, while not a thousand



occupy the rest; the wealthy part, being that which is thinly peopled, has to pay by far the larger share towards maintaining all the paupers that belong to the smaller and poorer district; and there is not one such parish which has not as good right as the heritors of Dunbar to complain of the irregularity in the distribution of the burden. Such complaints, if listened to and acted upon by the legislature, would lead to the most unjust divisions of the country; indeed they would soon render all division into districts impossible. The question here is, however, not what would be advisable had we the law to make anew, but what the law now is; not what right the Dunbar heritors have to complain, but what legal redress there is for their alleged grievance. They proceeded to institute an action of declarator and repetition against the magistrates, as representing the burgh, and concluded to have it “found and declared “by decree of the Lords of our Council and Session, “that the management and maintenance of the poor of “the landward district, with their tenants and other inhabitants thereof, are not liable for the support of the “poor of the burgh, but for that of the poor resident “within the landward district allenary; and the said “provost, magistrates, and council, as representing the “community of the said burgh of Dunbar, ought and “should be decerned and ordained by decree foresaid “to sustain and manage the poor of the said burgh according to law; or otherwise, in the event of the pursuers failing in the above conclusion of their action, “then and in that case it ought and should be found “and declared by decree foresaid that the power of “taking up the lists of the aggregate poor, determining “the assessments, and managing the funds, belongs to “the meeting of heritors, provost, minister, and elders;

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

“ and that the assessments to be imposed for the support  
 “ of the aggregate poor shall be laid on the whole of  
 “ the inhabitants of the parish equally, whether in burgh  
 “ or to landward, ‘ according to the estimation of their  
 “ ‘ substance, without exception of persons ;’ or our said  
 “ Lords ought and should find and declare in the pre-  
 “ mises as to them shall seem just : and further, the said  
 “ provost, magistrates, and council, as representing the  
 “ community of the said burgh, ought and should be  
 “ decerned and ordained to repeat and pay back to the  
 “ pursuers the sum of 1,000*l.* sterling, or such other  
 “ sum as shall be ascertained, before extract of the  
 “ decree to follow hereon, to be the excess of assess-  
 “ ments contributed by the pursuers during the course  
 “ of the process, beyond the proportion for which they  
 “ are justly liable under the foregoing declaration, with  
 “ the legal interest due thereon from the periods of  
 “ payment.” The question then which was raised before  
 the Court below, and is now brought before your Lord-  
 ships by appeal, is, whether or not the parish of Dunbar  
 is by law divisible, or rather divided, into two districts  
 quoad the management of its poor ; one of these districts  
 being the royal burgh under the magistrates, and the  
 other the landward part under the minister and kirk-  
 session. The Court below, on consultation of all its  
 judges, held that it was so divided, and pronounced its  
 decree to that effect ; the claim of repetition being given  
 up by consent. But this decision was made by the nar-  
 rowest majority, and learned judges of great eminence  
 gave their countenance to both the opinions entertained.  
 Upon a careful consideration of the whole case, I am  
 of opinion that the judgment of the smaller number was  
 right, upon every principle of sound construction which  
 can be applied to the statutes, and upon all the established

general views of law which can govern questions of this description. It is admitted that there are no authorities, either of text writers or decided cases, which can be resorted to for our guidance in this question. We must attend to the statutory enactments,—to the principles which are applicable to such provisions in a case of this kind, and to the usage in this parish, as well as in almost all the rest of Scotland. It is most justly observed by the Lord Justice Clerk, that the provisions for the poor, and the powers to assess for their relief, are the mere creations of statute. Every thing then must, in respect to those important matters, turn upon the statutory enactments. But I cannot go along with his Lordship, when, for this reason, he denies that usage, however long and inveterate, could be binding and operative on the parties. It is quite true that, as against a plain statutory rule, no usage is of any avail. But this undeniable proposition supposes the statute to speak a language not to be misunderstood,—a language plainly and indubitably differing from the purport of the usage. When the statute, speaking on some points, is silent as to others, usage may well supply the defect, especially if it is not inconsistent with the statutory directions, where any are given; or when the statute uses a language of doubtful import, the acting under it for a long course of years may well give an interpretation to that obscure meaning, and reduce that uncertainty to a fixed sense: *optimus legum interpres consuetudo*, which is sometimes termed *contemporaneous exposition*; and where you can carry back the usage for a century, and have no proof of a contrary usage before that time, you fairly reach the period of *contemporary exposition*. Let us now look to the statutes; and the first and leading one on which all turns is the act of 1579, cap. 74. The preamble,

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.  
—  
10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

referring to the older acts, is chiefly remarkable as reminding us, that by those still earlier provisions all the arrangements touching the poor were of a parochial nature, and bore immediate and constant reference to parishes; no other boundary is by them recognized. The act of 1579 itself pursues the same course, and regards no division but that of parishes, unless in the case of burghs, that is, of a parish or parishes wholly burgal; and the reason why it specifies this latter case, and provides for it, is not so much to deviate from the principle of regarding only parochial boundaries, as to save the jurisdiction of magistrates within their own peculiar province,—the royal burgh over which they preside. Thus the first enactment relates to vagrants and sturdy beggars. These are to be carried before the magistrates in burghs, and in landward parishes before justices to be appointed, or lords of regality; and those authorities,—that is, the magistrates in burghs, and the justices and lords of regality in landward parishes,—are to punish the offenders, or take security for their conduct. The other provisions respecting vagrants are to the like effect as regards the burgh and landward parishes, with this additional circumstance, that they never once mention the burgh magistrates or burgh jurisdiction as applicable to provisions made both touching burgh and landward parishes; while once or twice, probably per incuriam, “parish” alone is mentioned, and parish jurisdiction, although it seems plain that the burgh jurisdiction must be supplied for burgh parishes. This is only worth observing as evincing how much more parochial division was in contemplation of the legislature than any other, even when parishes wholly burgal were in contemplation. The rest of the act is framed on the same plan. Registers or lists of the poor

are to be made by inquisition, taken by the magistrates of each burgh and town, and by the justice appointed in every landward parish; the lists are to be kept by the magistrates in each burgh, and the justice in each landward parish; and all the poor are required to repair to the parish where they were born, and there settle themselves, under pain of being deemed vagrants. They are not to return to the burgh or town, but to the parish, because parochial division is the thing mainly regarded throughout the act; and a burgh may have more parishes than one. Here let us only observe, that in case a pauper was born in a parish partly burghal, partly landward, he complied with the statute, and escaped the penalty by resorting to and abiding in any part, burghal or landward, of the parish; but, if he was born in one of two burgh parishes, he was liable to the penalty, if he resorted to the other, though still he would be in the same town. The construction which would raise a distinction between the landward and burgh parts of the same parish must admit that a pauper, born in the landward part, might safely return to and settle in the burgh part, and then he would encumber the burgh fund, and so vice versâ of one born in the burgh part of the parish. Now, if the division contended for by the argument of the pursuers and respondents has any meaning at all, it is, that the landward poor shall be sustained by the landward part, and the burgh poor by the burghal part. But that is rendered impossible by this provision respecting their several settlements. If, again, to escape from the force of this consideration, it be said that the landward-born poor must resort to the landward parts, and the burgh-born poor to the burgh part, I ask what provision of the act hints at such a distinction in respect of settle-

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

ment? But the matter here dealt with is of a penal nature, and even highly penal ; for vagrancy may terminate, by the provisions of the act, in even capital punishment. Therefore this provision, relating to settlement, must be most strictly interpreted, and consequently we are not at liberty to supply, by intendment, a provision which is not in any way to be found in the act, namely, that persons having a landward settlement by birth, or seven years' residence, shall go to the landward part, and those having a burgh settlement to the burgh part. The exigency of the act is clearly complied with by the party returning to any part of the parish. To illustrate this point further, suppose a pauper brought before the burgh magistrates as a vagrant, and indicted for that offence, his vagrancy consisting in having continued out of his parish where he was born or had lived seven years last past, above forty days after the proclamation, the indictment must follow the section which constitutes that absence a constructive vagrancy, and the very words must be used. The averment must be, that the defendant being born within the parish of Dunbar, and not having lived during seven years last past in any other parish, and being a pauper, did not return and repair to the said parish and there settle himself within the space of forty days after proclamation made of a certain act passed in such a year. Now, if the pauper had been born in the country part, and had returned to the burgh part, he must have been acquitted ; for the material averment of the indictment would be negatived by the evidence. No consideration of burgh or landward would ever have been had. The same may be said of the remaining provisions. The lists are to be made by the magistrates for towns and the justices for landward parishes ; and the magistrates and

judges in the parishes to landward are to tax and stent the whole inhabitants within the parish according to their substance; and distributions are to be made among the poor by the magistrates within burgh, and the judges in the parishes to landward respectivè. So testimonials are to be given by the magistrates in towns, not distinguishing parishes, and by the justices in parishes to landward, manifestly in order to enable the magistrates to certify for all the parishes within the town indiscriminately. The subsequent act laid the duties formerly assigned to justices upon the kirk session; and the proclamations in the reign of William and Mary follow nearly the same course, only inclining more to the construction which lays the duty on the parishes merely. In all these provisions, then, we can discover only one case in which the bounds of the royal burgh and the jurisdiction of the magistrates are recognized,—one case only in which there is a distinction taken between burghal and landward, and that is the case of a parish or parishes wholly burghal, and a parish wholly landward. This is no exception at all to the general principle of parochial division followed throughout the act, for that division is here also strictly preserved. But no provision whatever is made,—no notice at all is taken of a parish partly burgh and partly landward; it is considered, therefore, as a parish, and dealt with as such. The silence of the act on this case is quite decisive, and we have no right to speak for it. When we see nothing recognized throughout but parochial boundary, we can have no right to imagine another division of burghal and landward districts. Burgh and landward are indeed terms used; but how used? Not as designating parts of the same parish, but as de-

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.  
—  
10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR.

10th Apr. 1835.

noting two different kinds of parishes. There is notice taken of and provision made for a burgh which is a parish, or it may be two parishes, though that is only in one or two instances. There is likewise notice taken of and provision made for a landward parish, but no mention whatever seems, nor is any thing at all rested upon the distinction between that part of a parish which is burghal and that which is landward. We should be introducing a perfectly new matter, if we supposed any such division to be made. We should be really inventing a kind of district or territory wholly unknown to the law. The law is conversant with parishes; it is our most ancient division of territory, and loses itself in the most remote antiquity in every part of the island, being in England, as in Scotland, far beyond the time of legal memory. The law is likewise conversant with burghs, and their bounds are ascertained, though, generally speaking, established in much more recent times. But that portion of territory which is in a parish and not in a burgh, is wholly unknown to the law, as contradistinguished from the rest of the parish. It is a part of the parish, and known as such, that is, known in relation to the parish. But we have no name even, much less any legal description, of such a district. To maintain any such distinction in any such district is contrary to all legal principle, and is indeed arbitrary and gratuitous. Equally so, perhaps still more violent, is the supposition which would give birth to a new jurisdiction extending over and limited to such a district. The magistrates have their known jurisdiction in burghs, the kirk session in parishes. But we are called upon to create a jurisdiction, and to vest it in the kirk session, com-



prising it within certain limits wholly unknown to the law. It is the jurisdiction of the kirk session over that part of a parish which falls beyond the bounds of a town, but which is situated in the parish. This intention might be accomplished,—the jurisdiction might be conferred,—the district might be created; and its bounds being defined, the jurisdiction might be extended over that district, and limited by those bounds. The Legislature might have done this, and it may now do it. If it had done so, there would have been an end of the question; the statute would have said so, and that would have been enough. But it must have said so expressly and plainly; no conjecture and no constructive reasoning can supply any such thing. Nay, such a division of territory, and such a creation of jurisdiction, is exactly the last thing that we are at liberty to fancy or to imply. At the same time, if for a long course of years the poor of the parish of Dunbar had been managed, as to assessment, settlement, and sustentation, in two divisions, and the parish had thus been divided, as it were, into two parishes, for the management of the paupers; and if the same kind of division and double administration had been uniformly followed in all or almost all the other mixed parishes of Scotland, I am not disposed to deny that this would have entitled us to impose a construction upon the act according to the practice or use. There being nothing absolutely self-repugnant in the division, we might have regarded the case of a mixed parish as not omitted, but capable of being raised by construction,—a somewhat forced construction certainly on the words of the act, but raised solely by the usage being of a contemporary date, and of an uniform kind. That, however, is not the case here; and the act, therefore, must be construed according to

THE  
MAGISTRATES  
OF DUNBAR

v.  
THE HERITORS  
OF DUNBAR.

—  
10th Apr. 1835.

THE  
MAGISTRATES  
OF DUNBAR  
v.  
THE HERITORS  
OF DUNBAR,

10th Apr. 1835.

its plain intent, which excludes all such new divisions as the respondents contend for, and the decree appealed from adopts. With this I should probably have been satisfied. But the case is considerably stronger, for the usage both in Dunbar and elsewhere is plainly with the construction contended for by the appellants. It would be a strong thing, indeed, to alter a practice so long established in this burgh, upon any speculative construction of the statute. But when we find that the same usage which prevails here has also prevailed almost everywhere else, it would be overlooking that which would have been a very important aid in the construction of a doubtful provision, and that which is a strong confirmation of the construction naturally put upon a provision by no means doubtful, were we to leave out of view the additional weight which this usage gives to the arguments against the decree. I have no hesitation, therefore, in recommending to your Lordships to reverse the interlocutors complained of, and to remit to the Court below, with instructions to dismiss the action of declarator and repetition, and to assoilzie the defendants from the conclusions of the summons.

The House of Lords ordered and adjudged, “ That the  
“ interlocutor complained of in the appeal be, and the same  
“ is hereby reversed : And it is further ordered, That the  
“ cause be remitted back to the Second Division of the  
“ Court of Session, in order that the Court may proceed  
“ further in the cause, as shall be just and consistent with  
“ this judgment.”

RICHARDSON and CONNELL — SPOTTISWOODE and  
ROBERTSON, — Solicitors.

[10th April 1835.]

The Reverend Doctor JOHN INGLIS and others, Trustees of the late Josiah Walker, Esq., Appellants.—  
*Dr. Lushington — A. Wood.*

THOMAS MANSFIELD, Esq., Trustee on the sequestrated Estate of James Stuart, Esq., late of Dunearn, Respondent.—*Sir John Campbell — Keay.*

*Bankruptcy — Stat. 1696, c. 5.—54 Geo. 3. c. 137.*—A party lent a sum of money on the security of a property which he was led to believe extended to ninety-five acres, but which, from the terms of the description, embraced only five acres; and after the borrower was bankrupt, and his estates had been sequestrated, and a trustee confirmed, and he had fled to another country, the lender obtained from him an heritable bond, embracing the lands originally intended to have been conveyed in security, on which infestment was taken before the trustee was infest: Held (affirming the judgment of the Court of Session) that the heritable bond so obtained was inept in a question with the trustee.

**JAMES STUART** of Dunearn, W.S., was proprietor (besides other subjects) of nine different parcels of lands in the county of Fife. To three of these parcels he had completed a feudal title; viz. 1st, the lands of Nooklands, 2d, the lands of Torryhills, including those of Sisterlands, and 3d, the lands of Brewery of Newton, afterwards called Hillside. To the remaining six parcels his right was personal, no infestment having been taken.

2d DIVISION.

—  
Ld. Moncrieff.

## CASES DECIDED IN

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

All these lands (with the exception of Torryhills) are contiguous to those called Hillside, and they popularly went under the general name of Hillside. On the lands of Hillside proper, or Brewery of Newton, a mansion house was built, and the ground was laid out partly in gardens and partly in policies. They did not extend to above six acres, while those passing under the name of Hillside contained about ninety-five acres. Part of the lands called Sisterlands were included in the garden connected with the mansion house of Hillside.

All these properties had been lawfully acquired, and his right to them was not subject to any latent qualification.

In the month of November 1823 Mr. Josiah Walker, Professor of Humanity in the University of Glasgow, employed Messrs. Joseph Gordon and Alexander Stuart, Writers to the Signet in Edinburgh, to lend out for him on heritable security the sum of 6,000*l.*; and these gentlemen had been also employed to lend for other two clients certain sums amounting to about 4,500*l.* At this time Mr. Stuart of Dunearn (who was stated to be Mr. Gordon's most intimate friend) communicated to Mr. Gordon that he wished to borrow 10,000*l.* on the security of his estate of Hillside. It was stated by the appellants that Mr. Stuart represented this property as extending to ninety-five acres or thereby, and as comprehending the whole ground belonging to him which lay adjacent to his house of Hillside. This was not admitted by the respondent; but it was not disputed, that with a view to obtaining this loan Mr. Stuart transmitted to Mr. Gordon a valuation which had been made in the same month by Dr. Coventry, Professor of Agriculture in the University of Edinburgh, and who

was very generally employed to value lands. That document was in the following terms:—

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ Contents and Estimated Value of the Lands, Planta-  
“ tions, &c. of Hillside, belonging to James Stuart,  
“ Esq., of Dunearn, and lying in the Parish of  
“ Aberdour, and Shire of Fife.

“ I.—Domain lands, east of public road.—84 acres.

“ 1. Arable lands, lawn, &c. 48 acres,

“ at 7*l.* 10*s.*, 360*l.*—at 28 years

“ purchase - - - - £10,080 0 0

“ 2. Walled garden, 1 acre, at 15*l.*,

“ and 24 years purchase - 360 0 0

“ 3. Plantations, 10 acres, per sum-

“ mary of estimate - - 2,119 10 0

£12,559 10 0

“ II. Lands, west of road, adapted for feuing.—

“ 36 acres.

“ 1. Southmost field, including 6 acres

“ of nursery, 15 acres, at 16*l.*,

“ say 13*l.* - - - - £195 0 0

“ 2. Field north of last, 7½ acres, at

“ 14*l.*, say 11*l.* per acre - 85 5 0

“ 3. Field north of last, 8½ acres, at

“ 14*l.*, say 11*l.* per acre - 90 15 0

“ 4. Northmost field, 5 acres, at 12*l.*,

“ say 9*l.* - - - - 45 0 0

416 0 0

“ Whereof 21 years purchase is £8,736 0 0

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

## “ Abstract.

“ I. Domain lands, 59 acres, at	-	£12,559	10	0
“ II. West of road, 36 acres, at	-	8,736	0	0
“ Add, mansion, offices, lodge, and				
“ old timber	-	1,200	0	0
<hr/>				
“ Ninety-five acres	-	22,495	10	0
“ Deduct 28 years purchase of bur-				
“ dens, per state	-	840	0	0
<hr/>				
“ Inde, estimated value	-	£21,655	10	0

(Signed) “ A. Coventry.”

“ Edinburgh, 17th November 1823.”

The appellants stated, that on the faith of this representation it was agreed to lend the money to Mr. Stuart, and on the 29th Messrs. Gordon and Stuart addressed the following letter to Mr. Stuart :—

“ We return Dr. Coventry’s letters, and valuation of  
 “ your Hillside property. We are prepared to lend  
 “ to you, in first security over this estate, (with the  
 “ exception of the 1,500*l.* you mentioned,) 6,000*l.* from  
 “ one friend of ours, and 4,300*l.*, in two sums of 3,000*l.*  
 “ and 1,300*l.*, from a family we act for, provided you  
 “ show, by searches, that your titles are unexceptionable,  
 “ and free from burdens, (with the exception specified,)  
 “ and that there shall be, besides the heritable security,  
 “ an assignment of the rents of your Cullelo property ;  
 “ with this understanding, that the assignment of the  
 “ quarry rent is not to be intimated, unless from neces-  
 “ sity, through failure otherwise of punctual payment  
 “ of the interest. The rate of interest, though specified  
 “ in the bonds to be five per cent., shall be restricted to  
 “ four and a half, payable half-yearly in Edinburgh,  
 “ and the rate not to be varied on either side for two

“ years. You will please send the titles, searches, &c.  
 “ on Monday, that the bonds may be prepared.”

INGLIS  
 and others  
 v.  
 MANSFIELD.

On the 1st of December Mr. Stuart returned this  
 answer:—

10th Apr. 1835.

“ I am favoured with your letter of the 29th instant.  
 “ Your understanding of the terms of the loan is correct  
 “ in all particulars but one. I offered an assignation in  
 “ security of Mr. Davidson’s rent of 360*l.*, or of the  
 “ quarry rent of 700*l.*, but not of both; and I men-  
 “ tioned to Mr. Gordon, that I preferred the former,  
 “ because I did not wish to intimate an assignation to  
 “ the tenant of the quarry. I have no doubt that this  
 “ explanation will be satisfactory to you. I annex copy  
 “ of the description of the lands, and shall immediately  
 “ get the searches completed, and the titles sent you.  
 “ In the meantime you may be preparing the deeds.”

The description of the lands here alluded to was ho-  
 lograph of Mr. Stuart, and was in these serms:—“ All  
 “ and whole the lands of Hillside, formerly called the  
 “ Brewery of Newton, with houses, buildings, yards,  
 “ orchards, greens, muirs, marshes, coals, coal-heughs,  
 “ annexes, connexes, parts, pendicles, and whole perti-  
 “ nents of the same whatsoever; together with the  
 “ teinds included in the said lands of Hillside, all lying  
 “ in the lordship of St. Colme, barony of Beith, and  
 “ sheriffdom of Fife.”

On the 3d December Mr. Stuart again wrote the follow-  
 ing letter, accompanied with the titles mentioned in it:—

“ I now send you search of encumbrances over Hill-  
 “ side, with charter of resignation 1795, disposition  
 “ 1795, sasine 1795, and renunciation 1797. — There  
 “ was no infestment in the lands from 1734, when  
 “ Alexander Stuart was infest, until 1795.”

INGLIS  
and others  
v.  
MANSFIELD.

10th Apr. 1835.

The titles so sent and referred to in the letter, embraced the three parcels of lands in which Mr. Stuart was feudally vested.

Three bonds were thereupon prepared by Messrs. Gordon and Stuart, one in favour of Mr. Walker for 6,000*l.*, and the others in favour of the two other clients. The description of the lands which had been communicated by Mr. Stuart was introduced into the drafts of those lands, which were thereupon transmitted to him for revisal; and on the 5th of December he sent them back accompanied by this letter. “ I return the drafts  
“ of the bonds all right. The assignation of rents is  
“ mere surplusage; and I am only averse to it as being  
“ contrary to practice, and as appearing to give a greater  
“ security than it really does. I don’t object to both  
“ assignations if you intimate neither; but you must  
“ be quite aware, that neither affords any real security  
“ to the creditors, as they may be defeated by renun-  
“ ciations, or by other ways,” &c. The bonds were accordingly extended and executed by Mr. Stuart on the 7th, and on the 1st of January 1824 infestment was taken on the lands of Hillside or Brewery of Newton, and the sasines were immediately recorded.

Interest was regularly paid by Mr. Stuart till the year 1828; and he did not borrow any additional money on any of the above parcels of lands. In that year he suddenly left Scotland in bankrupt circumstances; it was for some time unknown to what place he had gone. An application was made for sequestration of his estates, which was awarded on the 1st of September 1828, and the respondent was confirmed trustee upon his estate on the 6th of October of the same year. A decree of adjudication in his favour was at the



same time pronounced, which was recorded upon the 18th.

On examining the titles the respondent became satisfied that the security which had been granted did not extend over the whole ninety-five acres, but was confined to the lands of Hillside proper, which were worth about 1,000*l.*; and having intimated his intention to claim the other subjects as free from the burden for the general creditors, an application was made on behalf of the parties to whom the bonds had been granted to Mr. Stuart, then in America, to execute a supplementary deed. Accordingly, while at New York, he granted, on the 20th May 1829, a deed which was denominated a bond of corroboration, reciting in detail the communings for the loan, the transmission of Dr. Coventry's valuation, and the description, the correspondence, and the revisal of the bonds by him, after which the deed set forth, — “ that although, from the correspondence and  
 “ agreement herein-before detailed, and the extent and  
 “ nature of the transaction, there can be no doubt that  
 “ the true intent and meaning of the covenants entered  
 “ into betwixt the parties who made the said loans  
 “ through their agents, Messrs. Gordon and Stuart, and  
 “ me was, that the security granted to them, and each  
 “ of them, should extend over the whole of my lands  
 “ and estate known by the name of Hillside, and to  
 “ which the valuation by Dr. Coventry related; and  
 “ that it was understood and agreed at the time, that  
 “ the description of lands engrossed in the bonds, and  
 “ transcribed from the titles exhibited, covered the whole  
 “ of those lands; yet, as it has been alleged by parties  
 “ having, or pretending to have, interest in my proper-  
 “ ties, that the description in the said bonds does not

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ comprehend the whole of the said lands and estate of  
 “ Hillside, as contained in Dr. Coventry’s valuation, and  
 “ that the validity of the said securities is threatened to  
 “ be disputed by the said parties, it is therefore just  
 “ and reasonable that I should grant the cumulative and  
 “ corroborative disposition in security under written, as  
 “ well as similar deeds in favour of the other parties,  
 “ whose securities are threatened with challenge: there-  
 “ fore, wit ye me, the said James Stuart, without hurt  
 “ or prejudice to the personal obligation constituted by  
 “ my bond and disposition in security in favour of the  
 “ said Josiah Walker esquire, dated the 17th day of  
 “ December 1823, and the real burden created, or at  
 “ least understood to have been created and constituted  
 “ thereby, and by his seisin thereon, dated the 1st, and  
 “ recorded in the general register of seisins at Edin-  
 “ burgh the 6th days of January 1824, over the whole  
 “ of the said lands and estate of Hillside; but in confir-  
 “ mation of the said bond and disposition in security,  
 “ and infestment thereon, and in further and more full  
 “ and perfect implement to him, the said Josiah Walker,  
 “ of the covenant and obligation entered into by me,  
 “ as the condition of the advance and payment acknow-  
 “ ledged by the said bond and disposition in security to  
 “ have been made to me by the said Josiah Walker, as  
 “ at the term of Martinmas 1823, to have sold, alienated,  
 “ and dispoed, as I do hereby sell, alienate, and dis-  
 “ pone, to and in favour of the said Josiah Walker  
 “ esquire, his heirs or assignees, heritably, but redeem-  
 “ ably always, and under reversion, in manner after men-  
 “ tioned, all and whole my lands and estate of Hillside,  
 “ in the parish of Aberdour and sheriffdom of Fife, in  
 “ Scotland, extending to ninety-five acres of land or

“ thereby.” The separate parcels of lands were then minutely described, and a precept for infestment granted. Sasine was taken and recorded on the 13th of July 1829.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

The respondent as trustee had also required Mr. Stuart to execute a special disposition in terms of the bankrupt act in his favour, which Mr. Stuart accordingly did at New York on the 19th of June, and the respondent was infest on the 12th of August 1829.

In the month of January thereafter, the respondent as trustee raised an action of reduction against Mr. Walker of the bond of corroboration and sasine, on the grounds,  
 “ 1. That the foresaid disposition in security was impe-  
 “ trated by the said defender from, and granted by the  
 “ said James Stuart, for the farther security of the  
 “ defenders, in preference and to the hurt and prejudice  
 “ of the other creditors of the said James Stuart, and of  
 “ the pursuer as trustee for their behoof, subsequent to  
 “ the period when the said James Stuart had been ren-  
 “ dered legally bankrupt in terms of the foresaid statute,  
 “ 54 Geo. 3, c. 137, s. 1, by which it is enacted, that  
 “ ‘ every person, whether he be out of Scotland or not,  
 “ ‘ whose estate has been or shall be sequestrated under  
 “ ‘ the authority of any of the acts before recited, or of  
 “ ‘ the present act, shall, in like manner, be holden and  
 “ ‘ deemed a notour bankrupt in all questions upon the  
 “ ‘ act of 1696, from and after the date of the first de-  
 “ ‘ liverance on the petition to the Court of Session for  
 “ ‘ awarding the sequestration;’ and the said disposition  
 “ in security, and infestment thereon, are reducible, as  
 “ being and proceeding upon a fraudulent alienation in  
 “ terms of the statutes 1621, c. 18, and 1696, c. 5; and,  
 “ 2. That the foresaid disposition in security was impe-

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ trated by the defender from, and granted by the said  
“ James Stuart, subsequent to the period when his estates  
“ real and personal, and, inter alia, the foresaid lands  
“ and others, were specially adjudged and declared to  
“ belong to the pursuer as trustee foresaid, whereby the  
“ said James Stuart was divested thereof, and, conse-  
“ quently, the said disposition and infestment thereon  
“ are null, as being granted *à non habente potestatem*.”

In defence Mr. Walker contended, 1. That he had a good title to exclude the respondent as the representative of Mr. Stuart, or of his personal creditors, in respect that the original infestment must be held to embrace the whole lands which popularly passed under the name of Hillside; at all events, if Mr. Stuart did not thereby actually give such a security, he had been guilty of a fraud by inducing Mr. Walker to lend his money on the faith of a security extending over ninety-five acres; and the respondent, as the representative of general creditors, could not avail himself of that fraud; and, 2. That as Mr. Stuart was under an onerous agreement to grant a bond extending over the ninety-five acres entered into at a time when he was not bankrupt, the execution of the corroborative bond in implement of that agreement did not fall under the act 1696; nor did the decret of adjudication prevent Mr. Stuart from granting such a deed, nor Mr. Walker from taking infestment in the lands, seeing that at the time when he did so the trustee had not obtained infestment.

The respondent, on the other hand, maintained, 1. That although a trustee for general creditors, or an adjudger might be affected by any fraud by means of which a bankrupt had acquired property, or by a qualification, (such as that of trust,) affecting his radical

right to it, yet the circumstance of a bankrupt obtaining a loan of money on a fraudulent representation could not prevent them from attaching the property to which he held a clear and undoubted right; and, 2. That although a creditor who had obtained a disposition on an heritable bond prior to sixty days preceding the bankruptcy might take infestment, or otherwise formally complete the title either within the sixty days, or even posterior to the actual bankruptcy, yet the bankrupt could do no act and could execute no deed within that period to render the security effectual, and still less could he do so posterior to the sequestration which (whatever might be its effect in investing the trustee with the property,) had clearly the effect to divest the bankrupt, and to tie up his hands from granting any deed whatsoever.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

Mr. Walker having died, his testamentary trustees were sisted in his place; and Lord Moncrieff appointed the question to be argued on cases. On advising them, his Lordship reported them to the Court, and issued this note of his opinion:—

“ The summons in this case states two reasons of re-  
 “ duction; but it comprehends three grounds of law;  
 “ 1st, That the disposition and sasine called for consti-  
 “ tute an undue preference, in violation of the statutes  
 “ 1696, c. 5. and 54 Geo. 3, c. 137. 2d, That they  
 “ amount to a fraudulent alienation, contrary to the act  
 “ 1621, c. 18.; and 3d, That the disposition proceeded  
 “ à non habente potestatem, in respect that it was  
 “ granted after sequestration, and after the act con-  
 “ firming the trustee.

“ The facts are clear. The Lord Ordinary holds it  
 “ to be proved, 1st, That there was a bonâ fide agree-

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ ment concluded between Mr. Stuart and Mr. Gordon,  
 “ as agent of Professor Walker, by which the sum of  
 “ 6,000*l.* was to be given in loan by the latter, along  
 “ with two other sums, to be lent by other parties  
 “ through Mr. Gordon, making in all 10,500*l.*, on the  
 “ express condition of obtaining an adequate and com-  
 “ plete heritable security; 2d, That that agreement was  
 “ specific, to the effect that the security should extend  
 “ over the whole lands comprehended in the report of  
 “ valuation by Dr. Coventry, produced. The Lord  
 “ Ordinary has no doubt that the proof of these facts  
 “ is sufficient; for he is of opinion that, in the absence  
 “ of the original letters of Mr. Gordon, the copies of  
 “ Mr. Gordon’s letters, taken from his books, regularly  
 “ kept and sworn to, are admissible evidence against the  
 “ creditors, and are, with their counterparts in the  
 “ letters of Mr. Stuart, sufficient to establish the true  
 “ nature of the transaction. It is indeed impossible to  
 “ raise a doubt as to Mr. Gordon’s intention; for, if  
 “ he did not believe that he was getting a security over  
 “ the whole lands in the valuation, he must be supposed  
 “ to have wilfully taken what he saw to be no security  
 “ at all, at the same time that he professed his determi-  
 “ nation not to lend except on complete and adequate  
 “ real securities. 3d, It is admitted on the record, that  
 “ the lands in the valuation are identically the same  
 “ lands which are comprehended in the deed under  
 “ reduction, with one unimportant exception. 4th, This  
 “ transaction was concluded, and the whole money bonâ  
 “ fide advanced in December 1823, and bonds were  
 “ then granted for carrying it into effect. The bank-  
 “ ruptcy was in 1828.

“ The bond so granted to Professor Walker, in so

“ far as it was insufficient for giving a security over the  
 “ whole lands, was so made, contrary to the agreement,  
 “ on the faith of which the money was advanced; and  
 “ upon the admitted facts it is clear that it was framed  
 “ in this defective manner by the fault of Mr. Stuart,  
 “ whether that fault be considered as proceeding from  
 “ fraud or from error. The Lord Ordinary sees no  
 “ evidence of wilful fraud, and cannot presume it; but,  
 “ taking it to have been by error, it was still by the  
 “ positive act of Mr. Stuart as the borrower, in misre-  
 “ presenting the titles, and thereby misleading the  
 “ party with whom he dealt. It is not the same case as  
 “ if he had simply sent the title deeds to Mr. Gordon  
 “ to prepare the bond. With the misrepresentation,  
 “ the error could not, or could not naturally, be disco-  
 “ vered from the title deeds; and the error was of so  
 “ gross a nature, that, in this question, the act which  
 “ produced it must be considered as culpa lata quæ  
 “ æquiparatur dolo.

“ On the other hand, the deed under reduction was  
 “ not executed till after the sequestration and the  
 “ confirmation of the trustee.

“ But the money having been advanced on the faith  
 “ of obtaining a security over the specific lands con-  
 “ tained in that deed, more than five years before the  
 “ bankruptcy, the Lord Ordinary has no doubt that, if  
 “ the same deed had been granted before the seques-  
 “ tration, but within sixty days preceding it, it must  
 “ have been considered, not as a security for a prior  
 “ debt, but as implement of the previous specific obli-  
 “ gation, and therefore within the exception of novum  
 “ debitum, and not liable to reduction on the act 1696.  
 “ The cases of *Cormack v. Gardner's Trustees*, 8th July

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ 1829, and *Cranston v. Bontine*, 2d February 1830,  
“ seem to be conclusive of this point. It can make no  
“ difference whether the security was duly made at first,  
“ but not delivered till within the sixty days, or the  
“ security delivered at first was imperfectly executed,  
“ and was only made complete by another deed executed  
“ within the sixty days.

“ The act 1621 evidently cannot be applied to the  
“ case.

“ There is, however, great difficulty in the question  
“ upon the third ground of reduction, viz. that the deed  
“ was executed by the voluntary act of the bankrupt,  
“ after the sequestration and the confirmation of the  
“ trustee. When the point is stated in the abstract,  
“ there can be no doubt that no sequestrated bankrupt  
“ can effectually constitute a security over the estate by  
“ a voluntary deed. The estate becomes the property  
“ of the creditors, and there is an adjudication in the  
“ person of the trustee by the act of confirmation; and  
“ in this case the adjudication was special, the whole  
“ lands having been enumerated. But the present case  
“ is not resolved by this general point. For, 1. If the  
“ original contract be clear, and it be also clear that the  
“ first disposition was made imperfect by an error of  
“ Mr. Stuart, of a nature equivalent to fraud, the Court  
“ must determine whether it is competent to the cre-  
“ ditors or their trustee to avail themselves of such an  
“ error. Mr. Stuart held the estate subject to a specific  
“ obligation to make the security good over the whole  
“ lands in the valuation. If the estate passed from him  
“ to his creditors, it could only pass as it stood in his  
“ person with that obligation; and according to the  
“ judgment, and more particularly the opinions deli-



“ vered in the case of *Gordon v. Cheyne*, February 5,  
 “ 1824, the creditors could only take the right of the  
 “ bankrupt tantum et tale as he held it. 2. The adju-  
 “ dication in the person of the trustee did not divest the  
 “ bankrupt feudally. An adjudication without charter  
 “ and sasine has not this effect; and certainly, assuming  
 “ the existing obligation for a specific security, an ad-  
 “ judication by the defender would have been compe-  
 “ tent after the trustee’s confirmation; and, if first  
 “ completed, would have excluded him. The point of  
 “ difficulty is, that here the security was perfected by  
 “ the voluntary act of the bankrupt; and it has been  
 “ frequently decided that even diligence in itself com-  
 “ petent will be invalid to give a preference, if the  
 “ creditor has only been enabled to obtain it by the  
 “ collusive aid of the bankrupt. But, 3. If there was  
 “ a specific obligation to give the security, and if that  
 “ obligation was binding on the creditors, the question  
 “ is, Whether the pursuer has any legal interest to  
 “ reduce it as granted by the bankrupt, whether the  
 “ act of itself would in other circumstances have been  
 “ warranted or not? The deeds are valid in point of  
 “ form, Mr. Stuart not having been denuded; and if  
 “ the thing done was an act of justice which the credi-  
 “ tors might have been required to do, there can be no  
 “ interest to reduce it. *Frustra petis, &c.*

“ Though the question is one of great difficulty, the  
 “ Lord Ordinary is inclined to think that this is the just  
 “ and the legal result. Mr. Walker never for one  
 “ moment agreed to follow the personal faith of  
 “ Mr. Stuart, or imagined that his money was lent  
 “ otherwise than on the faith of a complete security  
 “ over the specific lands agreed on. If the security

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ stands, he will get nothing more than that which he  
“ had a right to believe was given at first, and which  
“ the creditors cannot take from him, without founding  
“ on the act of their constituent, by which he and his  
“ agent were deceived.

“ There is a separate point in the case, relative to  
“ certain parts of the lands which were held by  
“ Mr. Stuart by personal titles. With regard to these  
“ it seems to be clear, that the trustee must be bound  
“ by the latent equities, not limited to those which are  
“ in the constitution of the title; and the Lord Ordi-  
“ nary entertains no doubt that, if the security is other-  
“ wise not reducible, the defenders had a right to com-  
“ plete the title in the bankrupt. If the trustee had  
“ done so, it would have accresced to Mr. Walker’s  
“ infestment. He could only avoid this by making up  
“ a different title, throwing the bankrupt out of the  
“ progress. But a creditor holding a specific security  
“ was entitled to put the matter right if he could.

“ The result in the Lord Ordinary’s opinion is, that  
“ judgment for the defenders ought to follow from the  
“ equity of the statutes and the general principles of law,  
“ under the cases of Cormack, Bontine, Gordon, and  
“ other similar cases.

“ Certain lands of Torryhills, which are not in the  
“ valuation, have been included by mistake in the last  
“ disposition. As to them, the deeds must be reduced,  
“ unless the defenders re-convey them at their own  
“ expence.” (Signed) “ J. W. M.”

On the question being argued before the Court, their  
Lordships ordered additional cases, which with the pre-  
vious cases they appointed to be laid before the other  
judges for their opinions.

*Lords Gillies, Mackenzie, Medwyn, and Corehouse.—*

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ It appears from the record, that, with one exception,  
“ there is no difference between the parties with regard  
“ to the facts of this case. It is admitted, that in 1823  
“ Mr. James Stuart, in negotiating a loan, offered, and  
“ that Messrs. Gordon and Stuart, on the part of their  
“ clients, agreed to accept, an heritable security over  
“ certain lands in the county of Fife, extending to  
“ ninety-five acres, and valued by Dr. Coventry at  
“ 21,655*l.* 10*s.* These lands generally passed by the  
“ name of Hillside; they were so called in Dr. Coven-  
“ try’s valuation, and the fact is not denied; but that  
“ name properly applied to one small tenement, not  
“ amounting to ten acres, and not worth the tenth part  
“ of the sum at which the whole estate was valued.  
“ That the heritable bonds might be prepared by the  
“ agents for the lenders, Mr. Stuart sent them Dr. Co-  
“ ventry’s valuation of the whole estate, a search of  
“ encumbrances, and such of the titles as were necessary  
“ to exhibit a valid progress. He afterwards sent a  
“ description of the lands, but it applied exclusively to  
“ Hillside proper, the separate tenement. In the bonds  
“ which were prepared by Messrs. Gordon and Stuart,  
“ and revised by Mr. James Stuart, that description  
“ was adopted, and the security, being in consequence  
“ limited to that tenement, was altogether inadequate.  
“ Five years afterwards Mr. Stuart having become  
“ bankrupt, and his estate being sequestrated, he was  
“ prevailed upon, by the agents for Walker, one of the  
“ lenders, to grant a bond of corroboration and a dis-  
“ position in security over all the tenements composing  
“ the estate of Hillside; and on these deeds Walker

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ took infestment before the trustee under the seques-  
“ tration was infest.

“ In these circumstances, the present reduction has  
“ been raised by the trustee to set aside the deeds exe-  
“ cuted by Mr. Stuart after sequestration; and the only  
“ fact in dispute between the parties is, Whether, in  
“ sending the erroneous description of the lands, and  
“ revising the deeds in which it was adopted, Stuart  
“ was guilty of an actual fraud; or whether his conduct  
“ proceeded only from inattention and negligence? We  
“ do not think that there is evidence of fraud. It is  
“ true, that a security which was granted by the late  
“ Dr. Stuart to his daughters for their provisions was  
“ prepared by their brother, Mr. Stuart, or in his  
“ writing office; and that it extended not only over  
“ Hillside proper, but the whole estate of Hillside, as  
“ well as other subjects belonging to Dr. Stuart; and it  
“ is presumable that Mr. Stuart must then have been  
“ aware of the distinction. But that happened seven  
“ years before the date of the bond to Walker, and in  
“ the interval the circumstance may easily have escaped  
“ his memory. It is still more material to observe,  
“ that an intentional omission of the lands could only  
“ have been made with the view of resorting to them  
“ afterwards as a fund of credit; but five years elapsed,  
“ during which he was in embarrassed circumstances,  
“ and often hard pressed for money; yet he never once  
“ availed himself of that resource, which, if he acted frau-  
“ dulently, it was the sole object of his fraud to obtain.  
“ It must be admitted, however, that his negligence was  
“ highly culpable, first in giving rise to the blunder, and  
“ afterwards in suffering it to pass uncorrected.

“ The summons of reduction is laid, first, on the  
“ statutes 1621 and 1696 ; and, secondly, on the ground  
“ that the deeds challenged were executed after bank-  
“ ruptcy and sequestration. It is clear that the statute  
“ 1621 does not apply to the case ; and accordingly,  
“ that ground of reduction has been abandoned in the  
“ pleadings.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ But if Walker, the creditor, stipulated in 1823 for  
“ a security over the whole estate of Hillside, and ob-  
“ tained a security over Hillside proper only, he  
“ remained a creditor for the additional security down  
“ to the date of Stuart’s bankruptcy in 1828, being a  
“ period of five years. If Stuart granted that security  
“ after his bankruptcy, or within sixty days of that  
“ event, by which Walker obtained a preference over  
“ the other creditors, and particularly over one Brown,  
“ who appears from the pleadings to have stood exactly  
“ in the same predicament as Walker, the case seems  
“ to fall directly both under the words and the spirit of  
“ the statute 1696.

“ As it was not the object of that statute to deprive  
“ a person of the management of his affairs during the  
“ period of the constructive bankruptcy, which it intro-  
“ duced, it has been held not to operate against pay-  
“ ments in cash,—against transactions in the ordinary  
“ course of trade,—or in the case of what has been  
“ called a novum debitum, that is, where there has  
“ been a bonâ fide interchange of values, compre-  
“ hending under that term securities granted for loans  
“ at the date of the advance. The last of these ex-  
“ ceptions, though proceeding on a simple and equitable  
“ principle, has occasioned considerable difficulty in  
“ practice. That difficulty arises from a separate pro-

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ vision in the statute, which, with a view to prevent the  
“ fraudulent evasion of its enactments, by antedating  
“ securities, declares that dispositions and heritable  
“ bonds, or other heritable rights on which infeftment  
“ may follow, shall be reckoned to be of the date of  
“ the sasine which follows upon them. This provision,  
“ if strictly applied, as it was in the case of Grant of  
“ Bonhard, must have produced great hardship; for  
“ although a person advanced money, and took an  
“ heritable bond or disposition in security, years before  
“ constructive bankruptcy commenced, yet, if he de-  
“ layed to take infeftment, he was in a worse situation  
“ than a creditor lending money, obtaining a security,  
“ and taking infeftment simul et semel within the sixty  
“ days. A contrary decision was, accordingly, given in  
“ Chalmers v. the Creditors of Riccarton, and after-  
“ wards in Burnet v. Johnston and Home. Therefore  
“ it is now settled law, as Mr. Bell observes, that no  
“ objection can be taken to an heritable security granted  
“ at the date of the advance, though sasine shall not be  
“ taken upon it till within the sixty days before bank-  
“ ruptcy. But a farther relaxation has been given, the  
“ extent of which does not yet seem to be determined.  
“ When a loan is made and a security stipulated, an  
“ interval frequently occurs between the advance of the  
“ money and the execution of the heritable bond or  
“ disposition by the debtor, which may be longer or  
“ shorter according to the nature of the deed, the local  
“ situation of the property, the state of the titles, and  
“ many other circumstances. Now, it has been re-  
“ peatedly decided that an interval of this nature does  
“ not expose the deed to challenge, although the sasine  
“ upon it is not taken till after the sixtieth day. In the

“ case of the Bank of Scotland v. Stewart and Ross, an  
 “ interval of seven weeks was not held fatal. In a more  
 “ recent case of Cormack v. Gardner’s Trustees, though  
 “ six months had intervened the deed was sustained;  
 “ but this decision is scarcely reconcileable with the  
 “ decision in the preceding case of the Trustees for  
 “ Brough’s Creditors v. Duncan, &c. But it will be  
 “ particularly observed, that in these and several other  
 “ cases to the same effect, though there was an interval  
 “ between the loan and the granting of the disposition  
 “ or warrant of infeftment, that interval had elapsed  
 “ previous to the period of constructive bankruptcy;  
 “ and the debtor, while yet sui juris and before his  
 “ hands were tied up by the statute, had done all that  
 “ was incumbent upon him or that he could do towards  
 “ the completion of the security.

“ But all these cases are perfectly consistent with the  
 “ doctrine, that if a loan is agreed upon, the money ad-  
 “ vanced, and a security stipulated, but that security  
 “ not executed by the debtor till after the sixtieth day,  
 “ any attempt on his part afterwards to remedy the de-  
 “ fect is unavailing. It is true, that in Houston and  
 “ Co. v. Stewart, an opposite view was taken by the  
 “ Court; but the decision was unanimously disapproved  
 “ of in the case of Brough’s Creditors, which has just  
 “ been cited; and in Maclean v. Primrose, we are  
 “ told by Mr. Bell that Lord Meadowbank accom-  
 “ panied his judgment with a note, ‘ in which he con-  
 “ ‘ demned the decision in the case of Houston and Co.,  
 “ ‘ as clearly contrary to principle, since an obligation  
 “ ‘ to grant a preference cannot constitute an actual  
 “ ‘ preference on an heritable subject in a question with  
 “ ‘ other creditors, and accordingly, it is one of those

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ ‘ decisions which is frequently quoted, and as often  
 “ ‘ disregarded by the Court.’ In Robertson Barclay v.  
 “ Spottiswoode, which occurred some years after that  
 “ of Houston and Co., an heritable bond had been  
 “ granted within the sixtieth day by a husband to his  
 “ wife, in terms of an obligation in his marriage articles;  
 “ the bond was sustained by a narrow majority; but a  
 “ reclaiming petition being presented, the case was com-  
 “ promised, and Mr. Bell informs us, on grounds which  
 “ he states, that if it had again come on, there is reason  
 “ to believe the ultimate judgment would have been  
 “ different. If Mansfield, Hunter, and Co. v. Cairns  
 “ did not proceed on the specialty noticed by Lord  
 “ Coalston in Hailes’ report of the case, it falls under  
 “ the stigma so often affixed to the judgment in Hous-  
 “ ton and Co. The distinction therefore appears to be  
 “ settled between cases in which the debtor has done his  
 “ part before the period of constructive bankruptcy, and  
 “ those in which he executes the deed subsequently to  
 “ that time. On this point reference may be made to  
 “ the trustee for Brough’s Creditors v. Spankie, which  
 “ is of the same date with that of the same party against  
 “ Duncan, and also to Maclean v. Primrose, just cited.  
 “ Mr. Bell seems to think, that in the Bank of Scotland  
 “ v. Stewart the Court returned to the doctrine laid  
 “ down in the case of Houston and Co., which had been  
 “ so often and so solemnly condemned; but that opinion  
 “ must have arisen from his overlooking the distinction  
 “ now explained, for the deed executed by the bankrupt,  
 “ though some time after the advance, was of a date, as  
 “ already mentioned, long before the sixtieth day.

“ We have been led to examine this point, because  
 “ the defenders have attempted, from the mass of deci-



“ sions relating to it, to extract the inference, that  
 “ wherever money has been advanced, and a security  
 “ stipulated, the case is to be considered as falling under  
 “ the exception of novum debitum, whatever length of  
 “ time may intervene between the advance and the  
 “ debtor’s obligation, and although that obligation may  
 “ have been granted after constructive or even actual  
 “ bankruptcy,—an inference which we are clearly of  
 “ opinion those decisions do not warrant.

“ But there is another and a different ground  
 “ on which, in their last argument, they rely with  
 “ greater confidence. It is said, that although a bonâ  
 “ fide purchaser is exposed to no objections but those  
 “ which constitute a radical defect in the title of the  
 “ seller, or in feudal property which appear on the face  
 “ of the records, a creditor-adjudger stands in a dif-  
 “ ferent situation, and takes the right adjudged, subject  
 “ to the conditions and under the equities, though  
 “ latent, by which it was qualified in the person of his  
 “ debtor ; or, in technical phraseology, he takes it  
 “ tantum et tale as his debtor held it. That this was at  
 “ one time the doctrine of the law of Scotland, though  
 “ not to the extent to which it is now maintained by the  
 “ defenders, may be granted ; and the case of Ireland,  
 “ which they cite, and others to the same effect, show  
 “ the opinions at one time entertained. But subse-  
 “ quently to that period the law has been settled other-  
 “ wise, by a numerous and consistent train of decisions,  
 “ which are not now to be called in question. Reference  
 “ may be made to the following cases:—The Creditors  
 “ of Douglas of Kelhead—the Creditors of Ross of  
 “ Kerse—Mitchell v. Ferguson—and more particularly  
 “ to Buchan v. Farquharson, in which a preceding

INGLIS  
 and others  
 v  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1935.

“ judgment in *Smith v. Taylor* was unanimously pro-  
 “ nounced to be erroneous. Afterwards, when *Smith*  
 “ and *Taylor* came again before the Court, although an  
 “ attempt to open up the interlocutor which had become  
 “ final was unsuccessful, the Court a second time unani-  
 “ mously condemned the decision.

“ The defenders have perplexed this point, by re-  
 “ ferring to a class of cases, with which it is nowise  
 “ connected. It is true that creditors attaching move-  
 “ ables by diligence, are not in the same situation as  
 “ *bonâ fide* purchasers. Nothing, except a *labes realis*,  
 “ such as that which arises from theft or robbery, can  
 “ be pleaded against the purchaser; while the arrester  
 “ or *poinder* takes the subject under the conditions  
 “ which affect the constitution of the real right in his  
 “ debtor, but not under his personal engagements or  
 “ liabilities on account of it. Thus, the exception of  
 “ *dolus dans causam contractui* is pleadable against the  
 “ arrester or *poinder*, while that of *dolus incidens in*  
 “ *contractum* is not so. In illustration of this princi-  
 “ ple various cases cited by Mr. Bell might be adduced;  
 “ and, it may be added, that the distinction was received  
 “ at a very early period into our law. In the case of  
 “ *Haitley*, reported by Lord Stair, a person had sold  
 “ goods and received payment of the price, though, in  
 “ consequence of his fraud or fault, they were not deli-  
 “ vered; but, in a competition, his creditor, who had  
 “ attached them by *poinding*, was preferred to the seller.  
 “ Even in the case of moveables, therefore, the creditor  
 “ using diligence does not take them *tantum et tale*, as  
 “ they stand in the debtor, that is, he is not responsible  
 “ for the personal obligations of the debtor concerning  
 “ them.

“ Incorporeal, and other personal rights, which pass  
 “ by assignation, stood at one time in a different pre-  
 “ dicament. With regard to them, the maxim assigna-  
 “ tus utitur jure auctoris was carried farther with us than  
 “ in the civil law, from which it was borrowed. The  
 “ assignee, whether a purchaser or a creditor, was held  
 “ only procurator in rem suam, and, on that footing,  
 “ subject to every exception maintainable against his  
 “ cedent. But that rule, of which Dirleton doubted  
 “ and Stair disapproved, was greatly modified, if not  
 “ overturned, by the House of Lords in the case of  
 “ Redfearne, and the bonâ fide assignee of an incor-  
 “ poreal subject, for a price paid, placed in the same  
 “ situation as the purchaser of a moveable. This deci-  
 “ sion, however, did not touch the case of a creditor  
 “ adjudging an incorporeal right; and, therefore, in  
 “ Gordon v. Cheyne, the Court, with perfect consis-  
 “ tency, decided, that certain shares of the stock of a  
 “ shipping company, which a bankrupt held in trust,  
 “ were not carried by his sequestration, the trust,  
 “ though latent, affecting the constitution of his right.  
 “ It is in vain, therefore, for the defenders to argue, as  
 “ they have done, that the decision in Gordon v. Cheyne  
 “ revived the doctrine of tantum et tale, which was  
 “ exploded in Buchan and Farquharson. It decided,  
 “ that creditors adjudging an incorporeal right, were  
 “ not in the same predicament with bonâ fide pur-  
 “ chasers, but it did not deprive them of the privileges  
 “ they formerly enjoyed, and it had no concern with  
 “ heritable property at all.

“ On these grounds we consider it clear that the  
 “ pursuer, as trustee for Stuart’s creditors, took the  
 “ heritable estate in which the bankrupt was infest,

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1885.

“ subject to no limitation or burden which did not  
“ appear on the face of the records; and his moveable  
“ estate under such conditions only as qualified his real  
“ right, but free from all his personal liabilities. If  
“ Stuart, therefore, in terms of his agreement, was  
“ bound to give Walker an heritable security over all  
“ the lands of Hillside, as well as Hillside proper, and  
“ nobody can doubt that he was so bound, that obliga-  
“ tion, though effectual against himself and his repre-  
“ sentatives, is not transmitted against his creditors.

“ But it is said that in this cause a fraud intervened;  
“ that Stuart obtained the loan by falsely representing  
“ that the security covered the whole estate of Hillside,  
“ and that his creditors cannot take benefit by that  
“ fraud, on the same principle that they could not  
“ retain goods purchased on a fraudulent pretence, or  
“ paid for by a forged bill. We are of opinion, that  
“ this plea admits of various answers. In the first place,  
“ as formerly observed, we do not think that there is  
“ evidence of fraud or wilful misrepresentation on the  
“ part of Stuart; on the contrary, it is more probable  
“ that the mistake originated from inattention. In the  
“ next place, though the contract was rescinded, there  
“ is no specific subject to vindicate, as in the case put  
“ of goods sold on a false representation, and still ex-  
“ tant. The claim of the borrower, therefore, must  
“ resolve into a personal action of damages, which, on  
“ the principle already explained, would not confer a  
“ preference over the other personal creditors. The  
“ case of the Duke of Norfolk and partners against the  
“ trustee for the annuitants of the York Building Com-  
“ pany illustrates this point. The company, under the  
“ authority of an act of parliament, had granted a

“ number of life annuities, and for the security of the  
 “ annuitants had disposed their estates to a trustee who  
 “ was infest. The annuity bonds became the subject of  
 “ commerce, and, as we are told by Elchies, passed from  
 “ hand to hand like bank notes. Many of the holders,  
 “ particularly in England, inadvertently, or from igno-  
 “ rance, took renewals of their bonds, by which the  
 “ heritable security under the trust-deed was lost. It  
 “ cannot be doubted that the company, and their  
 “ Scottish advisers, were perfectly aware, in renewing  
 “ these bonds, that the holders were deceived, and their  
 “ own estate to that extent disencumbered. Accord-  
 “ ingly, on the ground that the ignorance of strangers  
 “ had been taken advantage of, the Court of Session, by  
 “ their first interlocutor, preferred the annuitants to the  
 “ Duke of Norfolk and others, who had adjudged the  
 “ estates of the company; but on a reclaiming petition,  
 “ the interlocutor was altered, and the adjudgers pre-  
 “ ferred, by a judgment afterwards affirmed in the  
 “ House of Lords.

“ A few words are required on the recent case of  
 “ Cranstoun and Anderson v. Bontine. Graham of  
 “ Gartmore, who was debtor to his son Bontine in a  
 “ large sum of money, agreed in March 1826, to sell  
 “ his life-interest in that estate to Bontine, for a price  
 “ to be paid at Whitsunday following. At that term it  
 “ was arranged by a new agreement that Bontine, in-  
 “ stead of paying the price, should set it off against the  
 “ debt owing by his father. The conveyance was exe-  
 “ cuted in August, infestment followed upon it, and in  
 “ September Graham was rendered bankrupt. In these  
 “ circumstances the Court of Session assoilzied Bontine  
 “ from a reduction, on the act 1696, at the instance of

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1895.

“ a prior creditor. It will be remarked that the cir-  
 “ cumstance of the price being compensated instead of  
 “ being paid, on which the pursuers relied much, was  
 “ quite immaterial; for although it might have been  
 “ fatal to the transaction, if the new agreement had  
 “ been made within the period of constructive bank-  
 “ ruptcy, according to the decision in *Crawford v.*  
 “ *Stirling*, (Nov. 1752,) it took place long previous to  
 “ the sixtieth day, and before the operation of the statute  
 “ had commenced. Farther, if this transaction had  
 “ been followed by a conveyance also before the sixtieth  
 “ day, though infestment had been taken by Bontine  
 “ after that time, still the transaction was secure, agree-  
 “ ably to the cases of the *Bank of Scotland v. Stewart*,  
 “ and of *Cormack and others*, already mentioned. But  
 “ the important distinction between these cases and  
 “ Bontine’s already explained, (the conveyance by the  
 “ bankrupt in the one being previous to the sixtieth  
 “ day, while in Bontine’s it was subsequent,) was not  
 “ brought under the notice of the Court; and accord-  
 “ ingly there is a reference in the opinions of the judges  
 “ to both sets of cases, without distinguishing those by  
 “ which the law has been recently, and it is thought  
 “ correctly, settled, from those which preceded them,  
 “ and which have been so often unanimously con-  
 “ demned.

“ This judgment was affirmed in the House of Lords,  
 “ and the defenders rely on the opinion reported to have  
 “ been given on the occasion by the learned Lord who  
 “ presided. We doubt the accuracy of this report.  
 “ His Lordship is made to say, that ‘ he could find no  
 “ ‘ case which appeared to give much assistance in the  
 “ ‘ decision of the one before the House; and that their

“ ‘ Lordships were, for the first time, called upon to  
 “ ‘ put a construction on the statute 1696, in such a  
 “ ‘ case, and to lay down a general rule for the deter-  
 “ ‘ mination of cases of that class.’ The rule then given  
 “ is, that a voluntary deed, in the sense of the statute  
 “ 1696, signifies a deed executed by a party of his own  
 “ mere motion, with a view to give a preference to a  
 “ creditor, and without any express obligation to do so.  
 “ As the deed in Bontine’s case, therefore, was granted  
 “ in consequence of a previous obligation, his Lordship  
 “ held the statute not to apply.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ It may be true that the point had not previously  
 “ been considered in the House of Lords; but, as already  
 “ observed, it has been anxiously argued, and solemnly  
 “ and repeatedly decided in the Court of Session. The  
 “ case of Houston and Co. turned entirely upon that  
 “ point, and it was decided upon the principle laid  
 “ down by Lord Wynford. That judgment was unani-  
 “ mously condemned by the Court in Brough’s creditors,  
 “ on the principle, ‘ that an obligation to grant a security  
 “ ‘ does not entitle the creditor to fulfil it after he falls  
 “ ‘ under the retrospect of the act 1696.’ But it is  
 “ probable that it had been assumed, at the bar of the  
 “ House of Lords, that Mr. Bell was correct in holding  
 “ that the Court returned to the principle laid down in  
 “ Houston and Co., when they decided the case of the  
 “ Bank of Scotland v. Stewart, which certainly was not  
 “ the case.

“ There is an authority which, though not mentioned  
 “ in Lord Wynford’s opinion, may, perhaps, have had  
 “ influence with the House of Lords in inducing them  
 “ to adopt the construction given to the term ‘ voluntary’  
 “ in the statute 1696, and to which therefore it is

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ proper to advert. In the second branch of the  
 “ statute 1621 the same term occurs; and Sir George  
 “ Mackenzie, and after him Lord Bankton, have held  
 “ that a deed, though granted in implement of a pre-  
 “ vious obligation, is a voluntary deed, and reducible  
 “ under that branch of the statute. Mr. Bell, on this  
 “ subject, after citing Sir George Mackenzie, observes,  
 “ that his opinion does not appear to be law, and refers  
 “ to Kilkerran’s report of the case of Grant of Tillifour,  
 “ where it is said that the Lords agreed that the words  
 “ ‘ necessary causes,’ in the act 1621, are in practice  
 “ thus understood, that there be a previous obligation  
 “ to grant the deed; and though the words ‘ true, just,  
 “ and necessary causes ’ appear as they stand to be con-  
 “ junctive, they have always been disjunctive; so that  
 “ if either the deed be granted in consequence of a  
 “ previous obligation, or for a true and just cause, it is  
 “ not reducible. Now, as the statute 1696 is con-  
 “ fessedly a supplement or extension of the second  
 “ branch of the statute 1621, if the word ‘ voluntary ’ is  
 “ used in the sense here stated in the one, there is  
 “ ground to infer that it must be so construed in the  
 “ other also. But we are of opinion, that the learned  
 “ commentator is on this point inaccurate. Sir George  
 “ Mackenzie, in treating on the first branch of the  
 “ statute 1621, which relate to a competition between  
 “ a creditor and a gratuitous disponee, and in which  
 “ only the terms ‘ true, just, and necessary causes ’  
 “ appear, plainly indicates his opinion, though he states  
 “ it in the form of a question, that a deed granted for  
 “ an anterior obligation is not reducible, and indeed the  
 “ act would be inconsistent if it were. But when he  
 “ comes to the second branch of the statute, which



“ relates to a competition between a creditor who has  
 “ done diligence with an onerous disponee who has not  
 “ done diligence, he lays it down in the most explicit  
 “ terms, that an anterior obligation will not save the  
 “ deed. Now, it is plain, even from Kilkerran’s report,  
 “ that the Court in Tillifour’s case were construing the  
 “ first branch of that statute; and their opinion on the  
 “ words ‘ true, just, and necessary causes ’ in that  
 “ branch, instead of being opposed to that of Sir George  
 “ Mackenzie, was the same as his. Indeed, so accurate  
 “ a reporter as Lord Kilkerran could never have laid  
 “ it down that the law had been always so considered,  
 “ if so great an authority as Sir George Mackenzie  
 “ had clearly held the reverse. But what puts the  
 “ matter beyond question is, that Lord Elchies, in  
 “ reporting the same case, expressly mentions that the  
 “ discussion arose on the first branch of the act 1621,  
 “ which the Lord President thought might have some  
 “ weight in the question, though the rest of the judges  
 “ thought otherwise. The argument, therefore, is re-  
 “ torted with great force; for there is the uncontra-  
 “ dicted authority of Sir George Mackenzie, that the  
 “ term ‘ voluntary ’ in the second branch of the act  
 “ 1621, does not signify deeds granted proprio motu  
 “ only, but those also which are granted in implement  
 “ of a previous obligation. Bankton lays down the  
 “ same doctrine expressly, and Erskine by implication,  
 “ and there is a decision to that effect, Peat v. Beg.  
 “ If, therefore, the same construction of the term  
 “ ‘ voluntary ’ be adopted in both statutes, the rule said  
 “ to be laid down in Bontine’s case cannot be maintained.  
 “ II. Admitting that the statute 1696 does not  
 “ apply, the deeds now in question are challenged, on

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ the separate ground that they were granted subse-  
“ quently not only to notour bankruptcy, but to seques-  
“ tration. On this point it is perhaps enough to refer  
“ to Mr. Bell’s argument, which seems correct, that by  
“ the intendment of the statute, 54 Geo. 3, c. 137, no  
“ heritable security which is not completed before the  
“ first deliverance on the sequestration, can be com-  
“ pleted afterwards, even though the creditor held a  
“ previous warrant; for the retrospective effect given  
“ to the first deliverance, renders it a mid impediment  
“ to all such acts. But in this case there was no war-  
“ rant for infestment of a date previous to the seques-  
“ tration. If the bankrupt, whose hands were tied up  
“ by the sequestration statute, interfered to grant such  
“ a deed, he did that which he not only had no power  
“ to do, but which, without the consent of his creditors,  
“ was an act of fraud in him to attempt. In Maclean  
“ against Primrose, where the creditor of a bankrupt  
“ brought an action of implement against him, to exe-  
“ cute a deed stipulated for before his bankruptcy, it is  
“ said that the judges seemed to be of opinion, that  
“ when the creditors of a bankrupt oppose an action  
“ such as this, the bankrupt cannot be compelled to  
“ grant a deed, which, if granted without compulsion,  
“ would convict him of fraud, and be reducible under  
“ the statute 1696. It is of no consequence that the  
“ bankrupt is not actually divested of his heritable  
“ estate, to which his titles are complete, until sasine  
“ is taken in the person of the trustee, because the  
“ contrary rule would be inconsistent with feudal prin-  
“ ciple and the faith of the records; and, accordingly,  
“ the trustee is empowered to complete the feudal title,  
“ in order to accomplish the divestiture. But these

“ provisions do not derogate from the 38th section of  
 “ the act, which declares,—‘ that the whole estate and  
 “ ‘ effects of the bankrupt at the period of sequestration,  
 “ ‘ shall be a fund of division among those who were his  
 “ ‘ creditors prior to the date of the first deliverance,  
 “ ‘ regard being had to preferences obtained by secu-  
 “ ‘ rities or by diligence, before the said deliverance, and  
 “ ‘ not expressly set aside by this act, but to no other  
 “ ‘ claim of preference:’ And farther, ‘ that all trans-  
 “ ‘ actions of the bankrupt subsequent to the said date,  
 “ ‘ from which any prejudice may accrue to the cre-  
 “ ‘ ditors shall be null and void.’

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 ———  
 10th Apr. 1835.

“ If it could be maintained indeed, that even if  
 “ Stuart had not granted the deeds under reduction, the  
 “ pursuer would be bound to grant them on the prin-  
 “ ciple of *tantum et tale*, it might follow that the action  
 “ should be dismissed, on the strength of the maxim—  
 “ *frustra petis quod mox es restitutus*; but it has been  
 “ shown that that principle is inapplicable to the class  
 “ of cases to which the present belongs.

“ In conclusion it may be observed, that if the  
 “ defences set up against either ground of reduction  
 “ were to be sustained, it would lead to consequences  
 “ incompatible with the plain and declared object of all  
 “ the bankrupt statutes. Whether the principle of  
 “ *novum debitum* or anterior obligation be resorted to,  
 “ it is not alleged, if the insolvent within the sixty days  
 “ fails to grant a stipulated security, that this will  
 “ entitle the creditor to the same preference he would  
 “ have held if it had been granted. The daily and  
 “ uniform practice of the country is opposed to any  
 “ such supposition; take, for example, a number of

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ recent cases where the debtor was expressly bound to  
“ grant a security over a certain estate, but where it  
“ was ineffectual, in consequence of a blunder in the  
“ execution of the deeds. It follows, that if the debtor  
“ lies under similar obligations to various individuals, a  
“ very common circumstance and one which occurs in  
“ the present case, he would have it in his power,  
“ according to the defenders, to favour any one of them  
“ to the prejudice of all the rest. Thus, Stuart had his  
“ choice between Walker and Brown, and, as he has  
“ preferred the former and postponed the latter, he  
“ might if he had thought fit have done exactly the  
“ reverse. This surely would be inconsistent with the  
“ principle of fair and equal distribution, and it would  
“ be fortified by no exception admitted to the operation  
“ of the statute 1696.

“ The result appears if possible, still more absurd, if  
“ this power of preference is held to subsist, as the  
“ defenders argue, not only during the sixty days, but  
“ after the period of actual bankruptcy, and when the  
“ estate has been placed in the hands of the Court by  
“ the process of sequestration.

“ On these ground, therefore, we are of opinion  
“ that the deeds challenged in this case ought to be  
“ reduced.”

*Lord Craigie.*—“ I see no evidence of fraud on the  
“ part of the common debtor, in framing the security in  
“ question. There is real evidence of the contrary ;—  
“ 1st, because no after security was, de facto, given over  
“ the same lands, and 2dly, because the value of the  
“ lands, according to the report of a distinguished land  
“ surveyor, although now from general causes consider-

“ ably diminished, must still, it is thought, be sufficient  
 “ or nearly so to discharge the whole debt intended to  
 “ be secured on them.

INGLIS  
 and others  
 v.  
 MANSFIELD.

10th Apr. 1835.

“ It cannot, however, be disputed, that either from  
 “ inattention, or want of ordinary skill, the security, as it  
 “ has been made out, is in a very imperfect state, great  
 “ part of the lands, said to be in the view of the parties,  
 “ not being specified in the disposition, nor in the infest-  
 “ ment which followed. And one question will occur,  
 “ to whom this defect is to be imputed, whether to the  
 “ borrower, or to the agents for the lenders, which, in the  
 “ absence of the latter as parties cannot be determined at  
 “ this time. It is not easy however, to discover a principle  
 “ on which the loss should be thrown upon the general  
 “ body of creditors, to whom no blame is imputable.

“ The question now is, Whether, supposing for a  
 “ moment that the defect in the security, as contemplated  
 “ at the date of the loan, was owing to the fraud or culpa-  
 “ ble negligence of the borrower, or of the agents for the  
 “ lender, or of the whole of these parties generally, the  
 “ corroborative conveyance and security, as it is called,  
 “ obtained after sequestration awarded against the bor-  
 “ rower, is to have any force or effect? At the consul-  
 “ tation, Lord Corehouse held, that it might fall under  
 “ the Act 1696; while Lord Gillies was of opinion, that  
 “ without an action of reduction, in terms of that statute,  
 “ it might be declared to be ipso jure ineffectual, upon the  
 “ ground specially brought forward in the summons, viz.  
 “ that it had been obtained à non habente potestatem; the  
 “ whole active powers of the borrower, unless in the cases  
 “ particularly provided for by the statute, having been  
 “ by the sequestration itself withdrawn from him. In  
 “ this way his Lordship thought that the deed was not

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ voidable merely, but absolutely and altogether  
“ void : — and to this opinion I rather incline.

“ But on a third, and separate ground, it is humbly  
“ thought the supplementary security intended to be  
“ granted by the second bond can be of no effect, being  
“ not only not perfected before the sequestration, but  
“ originating in a voluntary act of the common debtor,  
“ when publicly insolvent, as well as divested of all  
“ power over his estate and effects, in virtue of the  
“ bankrupt statutes. Unless for this deed, the defenders  
“ could not obtain a decree of adjudication in imple-  
“ ment. The original bond per se, could not have  
“ authorised it. In this respect, the case is similar to  
“ that of M’Kellar v. M’Math, with this difference, that  
“ in the former case the object of the bond was merely  
“ to give facility to the diligence of one of the creditors ;  
“ whereas here the obvious and avowed purpose was to  
“ create a preference, by affording means to attach the  
“ sequestrated estate, by a mode of diligence to which  
“ the other creditors could not resort. Without it, the  
“ defenders’ only course would have been by entering  
“ a claim in the sequestration, which, so far as can be  
“ discovered from the documents referred to, he could  
“ only do with regard to the lands in question, as a  
“ personal creditor.

“ In this view, as well as in that suggested by Lord  
“ Gillies, the principle of frustra petis, &c., appears in-  
“ admissible to any extent. In the conclusion of the  
“ summons referred to, the trustee is not in petitorio.  
“ He demands nothing from the defenders, but merely in-  
“ sists for a judgment declaring the bond to be void, as  
“ ultra vires of the granter. If the bond is not effectual,  
“ the summons and decree of adjudication in implement,

“ with the infestment following upon it, must, by neces-  
 “ sary consequence, at the same time fall to the ground ;  
 “ while every plea or argument of the defenders, resting  
 “ upon proceedings prior to bankruptcy, will remain  
 “ entire. If, in the circumstances of the case, the de-  
 “ fenders, at the date of the bankruptcy, had a just  
 “ claim to be preferred to the personal creditors, or to  
 “ the trustee, when enforcing their rights, they will  
 “ have it still ; and upon such a claim, the trustee will  
 “ either give a judgment, or report the question, to the  
 “ Court. In strict form, no other measure can be  
 “ adopted.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ Yet there are strong reasons in expediency, why,  
 “ at this conjuncture, and after the full argument and  
 “ opinions already given, a determination on the whole  
 “ cause should now be pronounced ; and although, gene-  
 “ rally, I concur in the able and elaborate opinion of  
 “ Lord Corehouse, I cannot, upon a point of such vital  
 “ importance to the law of Scotland, refrain from stating  
 “ what has occurred to me.

“ It is a rule established with us, beyond all memory,  
 “ that there are no equities in competitions among  
 “ creditors. This principle was adopted, and carried  
 “ to its fullest extent, in the case of the Duke of Nor-  
 “ folk in 1752, to which reference has been made. It  
 “ has been held that *vigilantibus non dormientibus jura*  
 “ *subveniunt* ; and although no one ought to become  
 “ *locupletior alienâ jacturâ*, yet in *damno vitando*, every  
 “ one is entitled to avail himself of the blunders of those  
 “ whose interests are opposed to his. However clear  
 “ and honest the intentions of parties may have been,  
 “ yet, if the writings used are liable to objection in point  
 “ of form or solemnity, and still more, if, as in this

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ case, they are defective in the substantial parts, they  
 “ are in a competition held as inoperative and null. In  
 “ the case of a second security upon lands, even though  
 “ the prior security has been excepted in the clause of  
 “ warrandice, the apparently postponed creditor may,  
 “ on the bankruptcy of the common debtor, plead  
 “ any objection to the prior security that appears from  
 “ the face of the writings. So, after a competition has  
 “ begun, a party conscious of a defect in his own right  
 “ may, by any lawful means, but always without the aid  
 “ of the bankrupt, direct or indirect, correct the defect  
 “ pendente lite, so as to be preferred to his adversary,  
 “ although formerly in a better situation than himself.  
 “ On looking into the books of authority and the deci-  
 “ sions of the Court, to be found under the titles of Com-  
 “ petition, Execution, and Writ, it will be seen that the  
 “ most minute and critical objections, in point of ex-  
 “ ternal formality, or arising from the want of proper  
 “ and technical words in the instrument, have been sus-  
 “ tained. In such circumstances, and notwithstanding  
 “ the most satisfactory evidence of intention to give a  
 “ right, the existence of another deed, followed with in-  
 “ feftment, before the former one has been completed,  
 “ must create an undoubted preference.

“ These observations are not disputed in the general  
 “ case. It is the first regular infeftment in real estate,—  
 “ the first act of delivery in the transfer of moveables,  
 “ —and the assignation or conveyance first intimated,  
 “ in personal rights, that is preferred; although before  
 “ any of these forms have been gone through, an obli-  
 “ gation to dispone, or to make delivery, or to give a  
 “ valid assignation, can be shown. Particularly in re-  
 “ corded real rights, if appearing in the appropriate



“ register, unless fraud can be proved, the entry in the  
 “ record is the only evidence that can be depended upon ;  
 “ without this, a form calculated to give security to cre-  
 “ ditors and purchasers would become a snare to them.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ It is, indeed, in one particular case only, that an  
 “ attempt has been, of late, made to break through the  
 “ otherwise universal rule, and that is, in the case of  
 “ adjudications of lands ; as to which it has been con-  
 “ tended, that if the debtor has previously and bonâ  
 “ fide engaged to make a conveyance of the subjects  
 “ adjudged, this should be held sufficient, without any  
 “ actual transference in the ordinary forms of law, to  
 “ warrant a judgment in favour of the party having  
 “ such imperfect right ; and this, although the same  
 “ right had been in the most formal manner attached by  
 “ adjudication far beyond its value. And this prin-  
 “ ciple, if admitted at all, would be sufficient to set  
 “ aside a judicial sale under the bankrupt statutes, if  
 “ resting only on adjudications, or so far as adjudications  
 “ have been ranked on the price of the lands sold. The  
 “ decree of sale would not give an effectual title to the  
 “ lands, unless the infestment upon it had been followed  
 “ with uninterrupted possession during the prescriptive  
 “ period of forty years.

“ The recent decisions upon this subject have been  
 “ fully argued upon, and explained by Lord Corehouse ;  
 “ but, at a more early period, there are authorities, it  
 “ is humbly thought, not less conclusive. Thus, in the  
 “ case of base rights prior to the establishment of the  
 “ registers for publication, a later conveyance or adju-  
 “ dication, if followed by possession, was preferred to  
 “ the former ones, although clearly importing an obli-  
 “ gation to make an effectual transmission of the right ;

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ qualified by the personal right of the disponee. And  
“ he refers to the case of Mitchell v. Ferguson,  
“ 13th February 1781.”

*Lord Balgray.*—“ I concur in the opinion above  
“ given by Lords Gillies and others, and agree in the  
“ principles of law which are there detailed. At the  
“ same time, it may be proper, on account of the  
“ importance of the case, both to the parties and to  
“ the law, to make a few observations :—

“ I. Upon a most careful and attentive perusal of the  
“ whole facts detailed in the record, it does not appear  
“ that fraud can be laid to the charge of the common  
“ debtor, neither can any fault be imputed to the lender  
“ or his agents. It is perfectly clear to me, that a  
“ proper and prescriptive progress of titles was sub-  
“ mitted to consideration, sufficient to satisfy any con-  
“ veyancer, and which could not be discovered as  
“ defective, without a topographical examination which  
“ never hitherto has been held as the duty of any pro-  
“ fessional man. What therefore has taken place must  
“ be viewed as having proceeded from inadvertency or  
“ mistake. This, no doubt, creates an obligation against  
“ the common debtor to apply the proper correction,—  
“ but this extends no further than the parties imme-  
“ diately concerned. Creditors certainly cannot benefit  
“ themselves by fraud, but being certantes de damno  
“ vitando they have been always considered to be enti-  
“ tled to take advantage of errors and mistakes, to the  
“ effect of obtaining a fair and equal distribution of their  
“ debtor's effects.

“ II. The case of R. C. Bontine v. Graham, 17th De-  
“ cember 1829, is to be considered with some caution.  
“ The circumstances of the case are correctly stated by

“ Lord Craigie. The question was brought before the  
 “ Court in rather an imperfect shape and form. Per-  
 “ mission ought either to have been granted to amend  
 “ the summons, or the terms of the judgment should  
 “ have been framed so as to apply to the special circum-  
 “ stances of the case, and the way and manner in which  
 “ it was brought before the Court. Something of this  
 “ kind was suggested the day after the opinions were  
 “ delivered, but the judgment was signed, and the case  
 “ was immediately appealed.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ III. The present case stands in a very peculiar  
 “ situation. The act of the common debtor complained  
 “ of was subsequent to the sequestration, and so struck  
 “ at by the 38th section of the bankrupt statute, and  
 “ therefore, ante omnia, the bond of corroboration  
 “ should be set aside, and declared null and void.

“ It will still remain competent to the creditor to  
 “ claim at common law, and to enforce against the  
 “ trustee and creditors, as the representatives of the  
 “ common debtor, any right to withdraw any part of  
 “ the estate from the common fund of division.”

*Lord Fullerton.*—“ However sensible of the impor-  
 “ tance of the considerations urged in the preceding  
 “ opinion of Lord Corehouse and others, in support of  
 “ the application of the act 1696 to the present case, I  
 “ am not prepared to assent to the conclusion that the  
 “ pursuer would, upon that ground of action, be enti-  
 “ tled to judgment in his favour.

“ Considering the circumstances of this case; in par-  
 “ ticular, that the special security was not only stipulated  
 “ for, but that all parties seem to have acted under the  
 “ impression, that it was actually granted at the date of  
 “ the advance, I think it would be exceedingly difficult

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ rence to the lands in question, prior in date to the  
“ sequestration itself.  
“ In the recent case of Bontine, which, in the plead-  
“ ings, has been held of the same nature with the  
“ preceding one of Cormack v. Gardner, although  
“ altogether dissimilar, the warrant of infestment in the  
“ former case having been prior to bankruptcy, the  
“ circumstances were extremely peculiar. The Lord  
“ Ordinary had decided against the defender; but upon  
“ a reclaiming note, a majority of the judges altered  
“ that interlocutor. The judge dissenting was of  
“ opinion that the right was liable to reduction, as  
“ made out in fraud of the bankrupt statutes, and  
“ also upon the common law, being in fact a fraudulent  
“ conveyance made by a person publicly insolvent in  
“ favour of his son, a conjunct and confident person, in  
“ the most correct sense of the expression. To all this,  
“ however, it was answered, that from the manner in  
“ which the summons of reduction had been framed,  
“ and resting wholly upon the bankrupt statutes, these  
“ objections could not, in point of form, be listened to.  
“ Instead of bringing a supplementary summons to  
“ remedy the defect, an appeal was presented, and the  
“ judgment affirmed; although within a few days of  
“ the determination in the Court of Session, the  
“ defender had applied to the Court for shortening the  
“ induciæ of an adjudication brought by him against  
“ his father, and the application was complied with, for  
“ no less than 100,000*l.*, reserving, however, as usual,  
“ all objections contra executionem.—(See R. C. Bon-  
“ tine v. Graham, 17th December, 1829.) Whether,  
“ in virtue of this reservation, a transaction so ex-

“ tremely improper may not still be set aside in the  
 “ ranking, is yet to be decided ; but in all these cir-  
 “ cumstances, it humbly appears that the result cannot  
 “ be considered as a precedent in the present, or in any  
 “ other case where the summons has been prepared in  
 “ proper form.

·INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ It has been omitted, in reference to the case  
 “ of M<sup>c</sup>Math, to mention that of the creditors of  
 “ Dunbar v. Sir James Grant, 18th June 1793, F. C.;  
 “ where, in circumstances of peculiar hardship, it was  
 “ laid down by a great majority of the Court, ‘ That a  
 “ ‘ bankrupt ought to execute no deed by which the  
 “ ‘ situation of his creditors is affected, and that it  
 “ ‘ would be dangerous to support any deed of that  
 “ ‘ nature.’

“ Professor (now Baron) Hume, in his lectures on  
 “ the title of adjudication, gives a statement of the  
 “ decisions upon the point now at issue. Referring to  
 “ the case of Duncan v. Wyllie, 7th December 1803,  
 “ he says, that the estate of a bankrupt being seques-  
 “ trated, the right of the trustee, as adjudger for the  
 “ creditors in general, was not affected by a latent and  
 “ private deed granted by the bankrupt. This judg-  
 “ ment, he observes, altered the interlocutor of the  
 “ Lord Ordinary, which proceeded upon the old rule,  
 “ and was meant to be established for the rule in all  
 “ such cases as should afterwards occur. He adds,  
 “ that even when the law was otherwise understood, if  
 “ a person who was infest should dispone, and the  
 “ disponee should allow his right to remain personal,  
 “ without taking infestment, and if the creditors of the  
 “ disponer should adjudge the subject, and be pre-  
 “ viously infest, their right would not be liable to be

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ and so, in the case of personal rights of lands, he who  
 “ obtains the first infestment will be preferred. In  
 “ these cases, although before possession has followed in  
 “ the one case, or infestment in the other, the party so  
 “ situated may have become acquainted with the con-  
 “ veyance prior in date, still he will be preferred ; and  
 “ it would be singular if the result were different. In  
 “ the case of a prior conveyance being followed by one  
 “ of a later date, and this again accompanied by an  
 “ adjudication of the same date, obtained by a separate  
 “ creditor, the second conveyance, if followed by the  
 “ first infestment, would be preferred to the prior one ;  
 “ while, according to the argument maintained for the  
 “ defenders, the first conveyance would be preferred to  
 “ the decree of adjudication, although entitled to rank  
 “ *pari passu* with the second conveyance.

“ In the same manner an adjudger, who had gained  
 “ an easy victory over a creditor or purchaser, with a  
 “ blundered infestment will, after all, be obliged to  
 “ yield to another creditor or purchaser, who, like the  
 “ defenders, has, as to nine tenths of the lands, no war-  
 “ rant at all.

“ It is not easy to discover the grounds of such a  
 “ distinction as has been suggested. Our ancient  
 “ appraisings were truly judicial sales of lands, subject  
 “ to redemption within a certain period ; and although  
 “ these were followed by adjudications, which, by  
 “ authority of special enactments, are to be ranked  
 “ *pari passu*, if within a year of the first effectual one,  
 “ and are in some other respects different from appri-  
 “ sings, the two rights are, in general, of the same  
 “ nature, and attended with the same effects ; and  
 “ there is no authority, either expressed or implied, for

“ deciding that a decree of adjudication, prior or of  
 “ equal date, should be postponed to an obligation to  
 “ convey, however correct in point of form, if not fol-  
 “ lowed with infeftment.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 10th Apr. 1835.

“ But by the statute 54 Geo. 3. s. 29., and in the  
 “ circumstances here occurring, it is humbly thought,  
 “ that any difficulty that might formerly exist on this  
 “ point has been altogether removed. It will be  
 “ remembered that the awarding of a sequestration is  
 “ declared equivalent to an inhibition, and the general  
 “ adjudication which follows, is held to operate equally  
 “ in favour of all the creditors, no other adjudications  
 “ for debt being permitted. At an after period of the  
 “ sequestration, with a view to give a feudal right to a  
 “ purchaser, the trustee is authorized and required to  
 “ call for a special conveyance of lands from the bank-  
 “ rupt, and in default of this he is to deduce a special  
 “ adjudication, mentioning the different lands, so far as  
 “ known to him; and this adjudication which is declared  
 “ to be of the ‘ nature of an adjudication in implement,  
 “ ‘ as well for payment, or security for debt, shall be  
 “ ‘ subject to no legal reversion.’ In this manner, the  
 “ special adjudication is rendered equal to an expired  
 “ apprising or adjudication, or in other words, a right  
 “ of absolute property in the trustee, for the benefit of  
 “ the creditors, according to their rights and interests  
 “ at the time. The only diligence which can compete  
 “ with it would be an adjudication in implement, fol-  
 “ lowed with an infeftment prior to that of the trustee,  
 “ such as the defenders in this case attempted to  
 “ obtain, but, as it must now appear, to no effect; the  
 “ defenders producing no obligation to convey in refe-

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ to distinguish, upon any reasonable principle, between  
“ the present and that numerous class of cases, respect-  
“ ing nova debita, in which the Court have sustained  
“ the securities. But I do not think it necessary to  
“ enter into that enquiry here. The deeds under re-  
“ duction were granted, not merely after, or within  
“ sixty days of bankruptcy, but after sequestration, and  
“ after the statutory confirmation and adjudication in  
“ favour of the trustee. Such being the case, and con-  
“ curring as I do entirely in the preceding opinion,  
“ both on the subject of the inefficacy of the alleged  
“ personal obligation or constructive fraud in limiting,  
“ or in any way qualifying the right of the bankrupt to  
“ the prejudice of his creditors, and on the effect of the  
“ various provisions of the 54 Geo. 3. c. 137., I agree  
“ in the general result, that the deeds challenged in this  
“ case ought to be reduced.”

*Lords President and Moncreiff.*—“ The essential facts  
“ of this case are sufficiently ascertained in the record.  
“ But it is of importance to attend to the precise state  
“ of them.

“ That there was a definite agreement before  
“ Mr. Walker advanced his money; that a specific  
“ heritable security over all the particular lands com-  
“ prehended in the valuation by Dr. Coventry, obtained  
“ and exhibited for the purpose of this loan, should be  
“ granted in due and sufficient form, unico contextu  
“ with the payment to be made, is a fundamental and  
“ indisputable fact in the case. Neither the lender nor  
“ his agents ever, for one instant, consented to make  
“ any loan on the personal credit of Mr. Stuart, or on  
“ any thing less than a complete security, covering all  
“ the lands in Dr. Coventry's valuation. They even



“ insisted for additional security. We farther hold it  
 “ to be an equally certain fact, that Mr. Walker and  
 “ his agents did advance the money only in the assured  
 “ belief, that they had obtained such a perfect security  
 “ by infestment over the whole of those lands. In  
 “ what manner, and by what circumstances they were  
 “ led into this belief, we think also sufficiently clear  
 “ upon the record. But in the first place, we can  
 “ entertain no doubt of the fact, that the agents who  
 “ negotiated the loan, and Mr. Walker himself, did  
 “ bonâ fide act and transact solely on the faith that such  
 “ a security was actually granted; and this circum-  
 “ stance appears to us to constitute a very strong pecu-  
 “ liarity in the case.

“ It is next clear, that Mr. Stuart, instead of dis-  
 “ posing all the lands in the valuation in security of  
 “ the loan, extending to ninety-five acres, and valued at  
 “ 21,655*l.*, had disposed only a very small part of  
 “ them, consisting of about five acres, and only worth  
 “ about 1,000*l.*; the warrant for infestment covered  
 “ nothing more.

“ The cause of the security having been framed and  
 “ taken in this imperfect form, contrary to the faith of  
 “ the contract, and the firm belief of the lenders, is to  
 “ be found in the facts set forth in the record, in arti-  
 “ cles 8 to 17 of the defender’s statement. To the  
 “ order and result of those facts it is very necessary to  
 “ attend.

“ After the agreement had been concluded, on the  
 “ basis of a security to be given over the lands in the  
 “ valuation, Mr. Stuart sent a description of the lands—  
 “ but at first, nothing more; promising at the same  
 “ time to send searches of encumbrances and the titles,

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1885.

“ inferences, so as to become the instrument of fraud.  
“ It soon became a question, on the clause last referred  
“ to, whether, if an heritable security were bonâ fide  
“ contracted by deed and conveyance before the com-  
“ mencement of the sixty days preceding bankruptcy,  
“ but no sasine taken till within that time, the security  
“ was reducible under the act. In strictness there was  
“ a great difficulty, insomuch that in several cases the  
“ Court thought themselves bound to reduce; but  
“ afterwards a more correct view was taken on the  
“ principle and purpose of the statute, and those deci-  
“ sions were entirely set aside in later cases: January  
“ 29 1751, Johnson v. Home and Burnet; November  
“ 12 1799, Mitchell v. Finlay. That very rigid con-  
“ struction therefore being entirely exploded, and it  
“ being ‘ settled that no objection can be taken on the  
“ ‘ statute to an heritable security granted of the date of  
“ ‘ the advance, though sasine on such security shall not  
“ ‘ happen to be taken till within the sixty days before  
“ ‘ bankruptcy,’ neither those old decisions themselves  
“ nor any principle involved in them can now be of  
“ any authority.

“ But the just rule of construction established by  
“ the case of Johnson reached beyond the precise point  
“ of the case itself. It might happen that there was a  
“ clear specific contract for the advance of money, and  
“ the granting instantly, as the condition of such ad-  
“ vance, of a special security over a defined heritable  
“ subject; and yet neither the conveyance nor the  
“ infestment might be made at the instant of the  
“ advance made. Did that fall under the principle of  
“ the act 1696? So far from its being a fraud to grant  
“ the security subsequently, the fraud must lie in not

“ granting it as soon as possible, or at any time when  
 “ demanded. But if the security was to be con-  
 “ sidered as of the date of the sasine, it could signify  
 “ nothing whether the deed of security giving warrant  
 “ for the sasine was before the commencement of the  
 “ sixty days or not, if the sasine itself was within that  
 “ period. The principle of the question never could  
 “ or did depend on this. The point held was, generally,  
 “ that the statute did not at all apply to nova debita,  
 “ which have been explained by the decisions to mean,  
 “ all cases in which the advance of money has been  
 “ made on a specific agreement for the particular secu-  
 “ rity which happens not to be made or completed till  
 “ within the sixty days. This may happen where the  
 “ whole transaction has been within the sixty days;  
 “ or it may happen where the transaction is earlier, and  
 “ the warrant for infeftment is also previously given  
 “ but no infeftment is taken till within the period; or  
 “ it may be where the transaction is concluded before,  
 “ but by breach of contract or accidental circumstances  
 “ the proper deed has not been executed till after the  
 “ commencement of the sixty days. Is this last case  
 “ in any degree more within the plain provision of the  
 “ statute than either of the other two? Is it the case of  
 “ fraud or fraudulent preference contemplated by the  
 “ statute? We think that it is not; and that the more  
 “ general rule, finally and fully adopted by the Court,  
 “ as we apprehend, embracing it, has been founded on  
 “ a correct and equitable view of the nature and  
 “ purposes of the statute.

“ The first important case on the point is Mansfield,  
 “ Hunter, and Co. v. Cairns, February 25, 1771. In  
 “ that case both the bond and the infeftment were

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ tained a description which corresponded precisely  
“ with that previously given, and no titles were sent,  
“ from which it could be discovered that the main por-  
“ tions of the lands relied on were not in fact included  
“ in that description, but were held by separate titles.  
“ The agents in consequence made out the deed in  
“ those terms, and it was revised and executed by  
“ Mr. Stuart in that form, and infestment passed on it  
“ immediately; yet the fact now turns out to be that  
“ ninety acres of the ninety-five in the valuation were  
“ held by entirely separate titles, and were not included  
“ in the description.

“ There is a statement in the record that Mr. Stuart  
“ subsequently granted a security to a Mr. Brown, the  
“ deed being written with his own hand, in which he  
“ made use of the same description; and it is also there  
“ stated, that at a still later period Mr. Stuart granted  
“ a security to his sister or brother, both over the lands  
“ of Hillside, and by special description over the other  
“ lands in Dr. Coventry's valuation: but it has been  
“ explained that both these statements are inaccurate,  
“ the bonds to Mr. Stuart's brother and sisters having  
“ been executed in 1816, and that to Mr. Brown also  
“ previous to 1823.

“ Mr. Stuart's estate was sequestrated on the 1st  
“ September 1828. After his sequestration, and when  
“ he was in America, the defect in the security, as  
“ covering only five acres instead of ninety-five, was  
“ discovered; and then he granted the bond of corro-  
“ boration now under reduction, proceeding on a clear  
“ narrative, that the money had been advanced on the  
“ faith of a specific contract for a good security over the  
“ whole lands in Dr. Coventry's valuation; and on this

“ deed infestment passed before the trustee had obtained  
 “ infestment in the lands.

“ This appears to be the correct state of the facts,  
 “ and two questions of law arise—1. Whether the bond  
 “ of corroboration, &c. is reducible on the act 1696, as  
 “ a deed in security of a prior debt, executed after  
 “ bankruptcy or after the commencement of the sixty  
 “ days preceding the sequestration? and, 2. Whether,  
 “ supposing that it is not reducible on the act 1696, it  
 “ is invalid for want of power, or as a fraud at com-  
 “ mon law, as having been executed after the seques-  
 “ tration?

“ 1. The first of these questions appears to us to be  
 “ one of very great importance; because, if the deed  
 “ had been executed before the bankruptcy, we are of  
 “ opinion that in the circumstances of the case it could  
 “ not be reduced, without entirely subverting the esta-  
 “ blished law, as we have understood it, and departing  
 “ from the principle of a very long series of adjudged  
 “ cases.

“ The act 1696, c. 5. is a statute against the frauds  
 “ of persons becoming bankrupt; and in the part of it  
 “ here in question it has two provisions: 1. That any  
 “ dispositions, &c. after bankruptcy, or within sixty  
 “ days before it, ‘ in favour of his creditors, either for  
 “ ‘ his satisfaction or further security, in preference to  
 “ ‘ other creditors,’ shall be void and null; and 2.  
 “ That as to this question, all dispositions of heritable  
 “ rights shall be reckoned as of the date of the sasine  
 “ taken.

“ We are of opinion, that in interpreting a statute  
 “ such as this, expressly made for the prevention of  
 “ fraud, it could never be construed on doubtful

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.

MANSFIELD.

10th Apr. 1835.

“ plainly with reference to that description, as compre-  
 “ hending the whole lands. The description sent is in  
 “ the 9th article of the statement; and, connecting it  
 “ with the previous negotiation, it is evident, that when  
 “ it stated, ‘ All and whole the lands of Hillside, for-  
 “ ‘ merly called the Brewery of Newton, with houses,  
 “ ‘ buildings, yards, orchards, greens, muirs, marshes,  
 “ ‘ coals, coalheughs, annexis, connexis, parts, pendi-  
 “ ‘ cles, and whole pertinents of the same whatsoever,  
 “ ‘ together with the teinds included in the said lands  
 “ ‘ of Hillside, all lying in the lordship of St. Colm,  
 “ ‘ barony of Beith, and sherifffdom of Fife,’ it was cal-  
 “ culated, and must have been intended, to induce the  
 “ belief, that all the lands in the valuation were com-  
 “ prehended under the general name of ‘ the lands of  
 “ ‘ Hillside,’ with the amplifications annexed to it, and  
 “ that they were all included in the same titles, to be  
 “ sent with reference to it. The 10th article shows the  
 “ titles which were sent, viz. ‘ Charter of resignation  
 “ ‘ 1795, sasine 1795, and renunciation 1797;’ and the  
 “ answer to that article bears: ‘ Admitted, that on the  
 “ ‘ 3d December 1823, Mr. James Stuart sent to  
 “ ‘ Messrs. Gordon and Stuart the title deeds of the  
 “ ‘ lands referred to in the revised condescendence,  
 “ ‘ (article 2,) in which Mr. Stuart was infest. It is  
 “ ‘ denied that he sent the whole title deeds, or any of  
 “ ‘ the titles to the other lands which were not included  
 “ ‘ in the original bond.’ The searches sent expressly  
 “ related to the same description of the lands.

“ The charter 1795 is in process. We have parti-  
 “ cularly examined it. We find that it contains a  
 “ precise description of the lands of Hillside, in the  
 “ very words of the description previously sent by

“ Mr. Stuart ; it is in Latin of course, but being a ver-  
 “ batim translation of the words above quoted, it is  
 “ unnecessary here to recite it. The charter does also  
 “ contain other lands, viz. the lands of Nooklands, part  
 “ of Torryhills, a part of lands called Sisterlands, ‘ quæ  
 “ ‘ est circiter decima tertia pars acræ jamjam ablatam  
 “ ‘ et inclusam intra hortum de Hillside ’—the lands of  
 “ Dunearn, the lands of Orrock, and the lands of  
 “ Cullelo. Of these lands, it is clear that Dunearn,  
 “ Orrock, and Cullelo are not at all involved in this  
 “ question, being neither in the bond of corroboration,  
 “ nor among the subjects valued. Torryhills has by  
 “ mistake been put into the bond, but is admitted not  
 “ to have been in the valuation. As to Nooklands and  
 “ the fraction of an acre of Sisterlands, they are in the  
 “ bond of corroboration, and from the mention of them  
 “ in the second article of the condescendence, it is pre-  
 “ sumed that they were included in the lands valued ;  
 “ though that valuation has simply reference to the  
 “ estate of Hillside, and specifies no other lands by  
 “ name. Nooklands had evidently no more apparent  
 “ connexion with Hillside than any of the other lands  
 “ in the charter.

“ With the description previously sent and with this  
 “ charter and nothing else before them, Mr. Walker’s  
 “ agents made out the bond in the very words of that  
 “ description, and in precise conformity to the same  
 “ words in the charter.

“ It thus appears, that while the description given,  
 “ and precisely adopted in the bond made out, was ex-  
 “ pressly represented as applying to all the lands which  
 “ it was stipulated should be comprehended in the  
 “ security, the titles sent to the defenders agents con-

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ within the sixty days of bankruptcy; but the contract  
 “ for the security, at lending the money, was clear.  
 “ The Faculty Report bears:—‘ It was observed on the  
 “ ‘ bench, that where money was advanced, in conse-  
 “ ‘ quence of a communing, that an heritable security  
 “ ‘ should be granted, such bond was truly a novum  
 “ ‘ debitum, and did not fall under the statute.’ In the  
 “ fuller report of the opinions by Lord Hailes, the  
 “ principle is distinctly brought out. Lord Pitfour  
 “ says, ‘ The act 1696 is salutary in itself; it would be  
 “ ‘ quite otherwise upon the interpretation of Mansfield  
 “ ‘ and Co. By that statute a retrospect was wisely,  
 “ ‘ though boldly, admitted. Where the law forbids  
 “ ‘ new security for an old debt, the creditor is not hurt;  
 “ ‘ he has the same security as at first. Money lent on  
 “ ‘ the faith of an heritable security is the same thing  
 “ ‘ as a sale. It is plain that here there was no purpose  
 “ ‘ of parting with the money upon the promise either  
 “ ‘ of the doer or of the debtor.’ And President Dun-  
 “ das gives this strong opinion on it:—‘ If the act 1696  
 “ ‘ could have the interpretation put upon it by Messrs.  
 “ ‘ Mansfield, I would certainly move for an application  
 “ ‘ to parliament for a repeal.’ But the Court sus-  
 “ tained the security, Lord Monboddo only dissentient.  
 “ The next case is that of Houston and Co. v. Stewart,  
 “ 20th February 1772. The decision in that case has  
 “ been said to be erroneous; but in so far as it is  
 “ material here, it only followed the previous case of  
 “ Mansfield and Co. The bond and the infestment  
 “ were both within the sixty days; and the Court again  
 “ sustained the security. There was, indeed, ground  
 “ for doubt in the case; because there was no clear  
 “ proof of the fact that there was a stipulation for the



“ special security, as part of the original contract, and  
 “ this depended at last on parole testimony, which,  
 “ however, was found competent. But otherwise, the  
 “ case is a clear and distinct precedent, the principle of  
 “ which is again given by Lord Coalston thus:—‘ There  
 “ ‘ is satisfying evidence that it was communed and  
 “ ‘ agreed on, that the creditor was to get heritable  
 “ ‘ security, and that the money was advanced on that  
 “ ‘ footing. Had the obligation to grant heritable  
 “ ‘ security been afterwards given, it would have made  
 “ ‘ a difference.’ Lord Pitfour is still more precise:—  
 “ ‘ The act of parliament does not reach to this case.  
 “ ‘ The law meant to give a salutary remedy against  
 “ ‘ any partial deed in favour of any creditor; had it  
 “ ‘ meant to go farther, the retrospect would have been  
 “ ‘ intolerable. The law did not mean to interrupt the  
 “ ‘ course of common transactions. There was a novum  
 “ ‘ debitum here, no matter at what time contracted.’  
 “ The President:—‘ The obligation is to be considered  
 “ ‘ as an heritable bond of that date. The lateness of  
 “ ‘ the infestment varies not the case.’

“ Then came the case of Spottiswood v. Robertson  
 “ Barclay, November 19, 1783. That was the case of  
 “ an obligation in a marriage contract to secure a wife  
 “ heritably in a certain annuity, but not specifically.  
 “ Both the bond granted and the infestment were within  
 “ the sixty days; yet the Court sustained the security.  
 “ There was a reclaiming petition not disposed of; and  
 “ it is said that the case was compromised. There  
 “ might be ground for doubt, in so far as the obligation  
 “ was not specific; but at any rate the judgment was  
 “ not altered; and in so far as principle was involved,  
 “ it only followed two previous decisions.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ After these three consecutive decisions, the case of  
 “ Brough’s Creditors v. Duncan, &c. occurred. In that  
 “ case the obligation of debt was contracted by the  
 “ cautioners on 23d March; an heritable bond of relief  
 “ was granted on the 18th May; infestment was not  
 “ taken till November 20th; and it was agreed that  
 “ Brough should be held as legally bankrupt on the  
 “ 17th January. There was no proof, that in the  
 “ transaction on the 23d March it had been stipulated  
 “ that the specific security should be granted; and it  
 “ was only offered to be proved by the oath of the  
 “ bankrupt. But as the bond was executed on the  
 “ 18th May, six months before the commencement of  
 “ the sixty days, it is clear that, according to every  
 “ opinion now entertained, if the stipulation for the  
 “ security had been held to have been *pars contractus*  
 “ from the first, the security ought to have been sus-  
 “ tained, and the decision against it would be wrong.  
 “ Though the old doubts, however, about the date of  
 “ the infestment were revived, the ground of decision is  
 “ in the concluding observation on the bench: ‘ This  
 “ ‘ case, however, is attended with no difficulty what-  
 “ ‘ ever. The debt to the bank was contracted in  
 “ ‘ March, and the heritable bond was not granted  
 “ ‘ till May. During this interval Messrs. Jollie and  
 “ ‘ Duncan had only a personal claim of relief against  
 “ ‘ Brough; the heritable bond therefore being clearly  
 “ ‘ a farther security falls under the act 1696.’ We  
 “ conceive the view of the Court to have been, that  
 “ the granting of the security was not shown to  
 “ have been *pars contractus* on the 23d March; if  
 “ they had assumed that it was, the decision, besides  
 “ being contrary to three previous cases, would

“ be erroneous according to every principle now  
 “ held.

INGLIS  
 and others

v.

MANSFIELD.

10th Apr. 1835.

“ The case of Brough's Trustee against Spankie, &c.,  
 “ decided on the same day with that of Duncan, was  
 “ not very different. There was, indeed, a holograph  
 “ letter by Brough; but it was objected that it could  
 “ not prove its own date; and no proof appears to have  
 “ been offered. The bond in that case was within the  
 “ sixty days.

“ But whatever view may be taken of these two cases,  
 “ we find abundant authorities of a later date confirming  
 “ the principle of the previous decisions.

“ The case of Mitchell v. Finlay bears on the point,  
 “ in so far as, under an obligation in a marriage con-  
 “ tract to infest the wife in a special subject, the  
 “ husband two years after, and within sixty days of  
 “ bankruptcy, not merely gave infestment to the wife,  
 “ but by voluntary act took infestment himself, so as to  
 “ validate it. It was held, however, notwithstanding  
 “ the facility thus given by the bankrupt to a conjunct  
 “ and confident person, that the wife was entitled to  
 “ expedite infestment in the husband's person; and that  
 “ it should not be taken as his act.

“ The case of More v. Allan, though it related to  
 “ personal rights, illustrates the principle. Bills were  
 “ accepted on the faith of a particular consignment;  
 “ the consignee refused to take it, and a new consign-  
 “ ment and new bills were then framed within sixty  
 “ days of bankruptcy. It was held that this security  
 “ could not be reduced; and Mr. Bell states the reason  
 “ thus:—‘ That wherever the bankrupt interfered only  
 “ ‘ to do that which both the parties understood had  
 “ ‘ been done at first, and upon the faith of which

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ ‘ understanding alone the money was advanced, the  
“ ‘ act was not objectionable, nor such as could entitle  
“ ‘ the creditors to separate the security from the  
“ ‘ advance ;’—a principle which, if correct, is more  
“ applicable to the present case than to any other that  
“ ever occurred.

“ In the case of Maclean v. Primrose there was an  
“ engagement to grant a security unico contextu with  
“ the advance. Maclean became bankrupt without  
“ granting it ; and the Court (altering a bill-chamber  
“ judgment of Lord Meadowbank) gave decree to  
“ compel him to grant it. Mr. Bell says that they  
“ held, that if the creditors had opposed it, he could  
“ not have been compelled to do so ; but that is a  
“ point which remained untried and undecided.

“ The next case we observe is that of the Bank of  
“ Scotland v. Stewart, &c., which was decided by the  
“ Court unanimously in President Blair’s time. The  
“ transaction was on the 6th May 1801, the heritable  
“ bond on the 29th June, the infestment on the  
“ 27th October, and the bankruptcy on the 13th No-  
“ vember. But the Lord President takes it as admitted,  
“ ‘ That at the very commencement of the transaction,  
“ ‘ it was stipulated that Mr. Ross was to have this  
“ ‘ security, and that the title deeds were put into his  
“ ‘ hands, in order to get the disposition made out.’ In  
“ all other respects, and particularly in the date of the  
“ bond being five months before the bankruptcy, it  
“ was identical with the case of Duncan and Jollie ;  
“ but the judgment was the reverse ; and unless,  
“ therefore, Duncan’s case depended on that difference  
“ of fact or evidence, we must conclude that there was  
“ a difference of principle, and, at any rate, a plain

“ adherence to the rule of the cases of Mansfield,  
 “ Houston, and Robertson Barclay. Neither do we  
 “ find in the report any thing from which we can infer,  
 “ that the decision at all turned on the circumstance  
 “ that the bond was executed before the commencement  
 “ of the sixty days; and Mr. Bell, far from supposing  
 “ that it did, not only holds that the Court disregarded  
 “ the decisions in the cases with Brough’s Creditors,  
 “ and returned ‘ to the opinion which ruled Mansfield,  
 “ ‘ &c.,’ but professing to state the law of the subject,  
 “ as settled at the date of his last edition, he announces  
 “ the result of all the cases on this point thus :—‘ 2. It  
 “ ‘ has also been held, that wherever there is stipulated  
 “ ‘ a specific security over a particular subject, in con-  
 “ ‘ sideration and on the faith of which an advance of  
 “ ‘ money or transfer of goods is made, the completion  
 “ ‘ of that security, although after an interval of time,  
 “ ‘ and after the term of constructive bankruptcy has  
 “ ‘ begun, is not within the intended meaning of the  
 “ ‘ statute.’

“ To us it appears that, after all this, the point  
 “ might well be considered as settled. But Mr. Bell  
 “ still expresses doubts as to the principle founded on  
 “ the occasional dicta of Lord Braxfield, Lord Meadow-  
 “ bank, and, perhaps, other eminent lawyers, as to the  
 “ particular case of Houston, during the progress of  
 “ the question; and he says, that it may deserve recon-  
 “ sideration. We do not know what may be the limits  
 “ of the reconsideration of such questions; but, in the  
 “ present case, the question has been at least twice very  
 “ deliberately reconsidered, and the same rule has been  
 “ still farther confirmed.

“ In the case of Cormack v. Anderson, &c. the

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
10th Apr. 1835.

“ transaction was on the 13th of May 1822, and the  
“ stipulation for the security clear; the bond was  
“ executed on the 13th December 1822, but it re-  
“ mained in the hands of the granter till after seques-  
“ tration, and there was no evidence of delivery; the  
“ sequestration was on the 25th September 1827; and  
“ the infestment on the bond on the 29th September.  
“ The Court took up the case, on the footing of there  
“ having been no delivery; but held that no delivery  
“ was necessary on the ground, which was thus stated  
“ by Lord Glenlee:—‘ It is said the bond was not  
“ ‘ delivered. That may be of consequence as to  
“ ‘ voluntary deeds, but this is not a deed of that kind,  
“ ‘ but one which, by action of exhibition and delivery,  
“ ‘ the bankrupt might have been compelled to deliver.’  
“ Can it be said that the bankrupt, in that case, was  
“ any more bound to deliver the bond within the sixty  
“ days, or after bankruptcy, than Mr. Stuart was  
“ bound, in this case, to grant the bond of corrobo-  
“ ration? In so far as the act 1696 is concerned, the  
“ cases appear to be precisely parallel. But, at all  
“ hazards, the case of Cormack is directly in the face  
“ of the case of Brough’s Creditors v. Duncan, unless  
“ the latter depended on the want of evidence of the  
“ original contract; for in both the bond was executed  
“ long before the sixty days.

“ The concluding case on the subject is Cranstoun v.  
“ Bontine. A transaction for the sale of Mr. Graham’s  
“ liferent right was concluded on the 20th March 1826.  
“ No disposition was granted till the 5th of August 1826;  
“ infestment followed on it on the 7th of August; but  
“ notour bankruptcy took place on the 6th September  
“ 1826. We see no specialties in the case, except

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ what relate to the onerosity of the transaction itself;  
 “ yet it is a case in which the disposition was within  
 “ the sixty days; and, assuming the fact of a bonâ fide  
 “ transaction and advance of money, such as exists in  
 “ the present case, no decision could possibly be more  
 “ directly in point. The disposition and infestment  
 “ were both found not reducible on the act 1696; and  
 “ when we read the opinions of the judges, we cannot  
 “ doubt for a moment that the law was held to be  
 “ settled on the principle established by the long series  
 “ of cases to which we have adverted in this opinion.  
 “ Both Lord Balgray and Lord Gillies state the point  
 “ roundly; the latter in particular, in these words:—  
 “ ‘ But where an obligation to grant a conveyance was  
 “ ‘ entered into previous to the sixty days, as in the  
 “ ‘ present case, the conveyance following upon it,  
 “ ‘ although within the statutory period, was effectual,  
 “ ‘ being only in fulfilment of the pre-existing obli-  
 “ ‘ gation;’ and he goes on to distinguish this from the  
 “ case of ‘an agreement to secure a former debt.’  
 “ That judgment stands affirmed by the House of  
 “ Lords. It appears to us not to be very necessary to  
 “ consider what might be the precise observations made  
 “ in moving the affirmance. If it had been a judgment  
 “ reversing the decision of this Court, or on a question  
 “ new to the law, it might be right to weigh the  
 “ reasons well; but this is only the concluding case of  
 “ a long series, and the judgment is an adherence to  
 “ that solemnly given by this Court on clear and  
 “ distinct grounds. There are points still remaining in  
 “ that cause; but on this question of the operation of  
 “ the act 1696 the judgment is conclusive.

“ On this deduction of authorities, we venture, with

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ all deference to other opinions, to think that there  
“ never was any question of law more fully or delibe-  
“ rately settled than this is. There are the three cases  
“ of Mansfield, Houston, and Robertson Barclay before  
“ 1793; and, independent of the cases of Mitchell,  
“ More, and Maclean, there are since that time the  
“ three cases of the Bank of Scotland, Cormack, and  
“ Bontine, the last affirmed in the House of Lords.  
“ In the three first cases, and in the last, the deed of  
“ security was decidedly granted within the sixty days;  
“ and substantially it was so in Cormack’s case also.  
“ Throughout all the cases we find no trace of any  
“ distinction founded on the deed being before the sixty  
“ days or not; and in the case supposed to be chiefly  
“ adverse to the principle, that of Duncan, the bond  
“ actually was six months before the sixty days, so that  
“ in every view the decision in it was wrong.

“ We look, then, at the present case; the contract,  
“ and the bonâ fide advance of the money on the faith  
“ of it, are beyond all doubt. If the case were made  
“ identical as to the security with that of Duncan, by  
“ supposing the bond of corroboration to have been  
“ granted six months before the sixty days, it must,  
“ according to every opinion which we have yet heard,  
“ be sustained, contrary to that decision. But it is  
“ identical in the material point with the three first  
“ cases and the last, in so far as the act 1696 is  
“ involved. We must, therefore, conclude that the act  
“ 1696 does not apply to it, and that it cannot be held  
“ to apply to it, without departing from the law as it has  
“ been long and very carefully settled.

“ II. But a second part of this case remains for con-  
“ sideration. The bond of corroboration having been



“ granted after sequestration, it is maintained that the  
 “ estate had passed by the adjudication to the trustee,  
 “ though he had not got a feudal title, and that the  
 “ bankrupt was disabled by the bankruptcy from doing  
 “ any voluntary act.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr 1835

“ Here the principle of the act 1696 must be laid  
 “ aside. That act applied equally to deeds after bank-  
 “ ruptcy, and within sixty days preceding it, plainly  
 “ supposing that a bankrupt might at common law  
 “ grant effectual deeds after notour bankruptcy. Now,  
 “ here he has granted a deed on which infestment has  
 “ passed, which infestment must be effectual unless the  
 “ trustee can reduce it. But it cannot now be said  
 “ that it is a deed in security of a prior debt; if it were,  
 “ it would be under the act 1696: it must therefore  
 “ bear another character.

“ It is the case, then, of a deed granted for the pur-  
 “ pose of doing that which the defender's constituent  
 “ believed, and had a right to believe, was done at the  
 “ moment when he advanced his money in the year  
 “ 1823. It is in implement of a bonâ fide stipulation,  
 “ intrinsic of the contract, which the defender was  
 “ misled to believe was implemented at the first. It  
 “ was not so implemented, by the fault of the bank-  
 “ rupt, whereby Mr. Walker and his agents were  
 “ directly deceived.

“ Here the question arises, whether it is to be held  
 “ that this was done by the fraud of the bankrupt, and  
 “ it is a very serious question. Mr. Stuart was bound  
 “ to know the titles by which he held the property  
 “ which he offered as a security; the more especially,  
 “ as he ventured to act as his own agent; but he  
 “ deliberately sends to the defenders' agents a special

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ description, expressly held out as the description of  
“ all the lands, on the estimate of which the security  
“ had been agreed to be taken, and then he sends a  
“ charter, containing the same description verbatim, as  
“ the guide to the agents in making out the bond. But  
“ the terms of that title are such that no ordinary care  
“ could have discovered that it did not comprehend the  
“ whole lands, as composing the lands of Hillside.  
“ The deed is made out and deliberately revised, and  
“ afterwards signed by him, and he accepts of a loan of  
“ 10,000*l.* on a security believed to comprehend lands  
“ valued at 21,000*l.*, when, in fact, it comprehended  
“ lands only worth about 1,000*l.* On the other hand  
“ it appears that he had, a few years before, put his  
“ name to deeds in favour of his brother and sisters, in  
“ which the distinction of the titles was clearly marked.  
“ It would be with great reluctance that we should  
“ draw the inference, that when all this took place  
“ Mr. Stuart had it present to his mind, that the lands  
“ were held by separate titles, and that he deliberately  
“ intended to deceive Mr. Walker and his agents.  
“ We know that there may be unaccountable forgetful-  
“ ness, and great haste and rashness under difficulties;  
“ but we apprehend that there is such a thing as fraud  
“ in the eye of law, where not only a criminal pur-  
“ pose could not be shown, but persons of fair and  
“ liberal minds, from knowledge of the individual, may  
“ be convinced that no such purpose could exist. That  
“ Mr. Walker and his agents were, in point of fact,  
“ deceived can admit of no doubt; that they were  
“ naturally, if not necessarily, deceived by the course  
“ which the negotiation took, and the positive acts  
“ of the borrower, seems to us to be equally clear.

“ We were at first under an impression that all the  
“ title deeds, both of Hillside and of all the other lands,  
“ had been sent to Mr. Gordon. But on an accurate  
“ examination of the record, and of the charter therein  
“ referred to, it is quite clear that it is not so, as al-  
“ ready explained ; and whether it was by design or  
“ error on the part of Mr. Stuart that the proper titles  
“ were not sent, it still operated as directly to deceive  
“ Mr. Gordon as if it were proved to have been done  
“ by positive intention.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835

“ We are, therefore, constrained to come to the  
“ conclusion, that without necessity of holding that  
“ there was a directly fraudulent purpose, there were  
“ acts sufficient to constitute as to this question a fraud  
“ in the eye of law. Mr. Stuart’s readiness to grant  
“ the bond of corroboration may tend to impress the  
“ belief that he had great regret for the unjust effect  
“ which his inconsideration, at least, had produced ; but  
“ any agent who had done the same thing, however  
“ pure he might feel himself from any purpose to mis-  
“ lead, must have answered for it as for a legal fraud. In  
“ one word, if this was merely an error, it was an error  
“ of such a kind, that, in a question like this, it must  
“ stand in the same place with a direct fraud.

“ When the state of the security actually given was  
“ discovered, no one can doubt that there was an obli-  
“ gation on Mr. Stuart to do whatever he could to  
“ correct it. If it had been discovered at an earlier  
“ period, the defenders would certainly have had a good  
“ action to compel him to execute an additional deed,  
“ such as that which he did execute ; and he could not  
“ have resisted it, without rendering the case a very  
“ clear one of positive fraud. Whatever view, therefore,

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ may be taken of the bond of corroboration, we have  
“ no idea that Mr. Stuart did any thing wrong in  
“ granting it; on the contrary, we think that he was  
“ bound to grant it, valeat quantum, and to do all that  
“ he could for the relief of the defenders. Whether  
“ he could do it effectually is a different question.

“ A mistake sometimes enters into such discussions,  
“ as if it were impossible that the situation of a creditor  
“ could be at all altered or improved after sequestra-  
“ tion. But in various particulars the law is settled  
“ otherwise. A creditor by heritable bond, not infest,  
“ is entitled to take his infestment after sequestration;  
“ and if he obtains it before the trustee is infest, his  
“ preference is secure. In Cormack’s case the infest-  
“ ment was not taken till after sequestration, and,  
“ what is more, it was done by the voluntary act of the  
“ bankrupt in delivering the deed; and until the last  
“ bankrupt act, which made the act of sequestration  
“ equivalent to an intimated assignation, the holder of  
“ an unintimated assignment could run a race with the  
“ trustee for the first intimation. Still farther, there is  
“ a series of cases establishing this point, that where the  
“ bankrupt granter of a disposition on which sasine may  
“ or may not have passed has not been himself infest,  
“ and where the trustee holding the titles avoids in-  
“ festing him, that he may not validate the security,  
“ though the trustee may try to get a title throwing the  
“ bankrupt out of the progress, the creditor is entitled  
“ to run the race with him, and if he gets adjudication  
“ and infestment first he will be secure. This is clearly  
“ implied in the case of Mitchell v. Fergusson, 13th  
“ February 1781, though the trustee having the first  
“ infestment was preferred. It is implied also in the

“ case of Smith v. Taylor, 18th December 1795, even  
 “ holding that the decision was wrong, the trustee  
 “ having got the first infestment; and it is implied in  
 “ the case of Buchan v. Farquharson, May 24, 1797.  
 “ The only doubt was, whether it was competent to the  
 “ trustee to exclude the creditor by getting the first  
 “ completed right.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ This may not resolve the present question; it only  
 “ goes thus far, that all things are not closed by the act  
 “ of sequestration, and that a preference not previously  
 “ established may be made out after it. We know that  
 “ it is a rule established on sound principle and abun-  
 “ dant authority, that, after bankruptcy, the bankrupt  
 “ cannot give aid to one creditor to complete a pre-  
 “ ference by diligence which he could not otherwise  
 “ have completed. But neither does this solve the  
 “ present question; there may be exceptions even to  
 “ that rule. But the present case appears to us to  
 “ stand on different grounds. The power of disposing  
 “ the lands remained in Mr. Stuart; even the trustee  
 “ took his posterior title from him by disposition. The  
 “ question therefore is, whether the bond of corro-  
 “ boration can be reduced, not as proceeding à non  
 “ habente potestatem, but as a fraud, in respect that  
 “ he was bound to dispoise to the trustee. Was it  
 “ then a fraud in Mr. Stuart to dispoise to the de-  
 “ fenders, in corroboration of his previous deed; and  
 “ can the creditors maintain this reduction on the  
 “ ground of such a fraud committed?

“ On the best consideration that we can give to the  
 “ case, we think that it cannot be so treated. It is not  
 “ necessary to revert to a principle, at one time held in  
 “ the law, that all adjudgers must take the right of their

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1895.

“ debtor, tantum et tale as it stood in his person. That  
“ principle no doubt has been greatly modified ; but it  
“ has not yet been held, in any case that we are aware  
“ of, that an adjudger is in all respects in the same  
“ situation with an onerous purchaser. On the con-  
“ trary there is an important distinction still firmly  
“ established, viz. That wherever there is fraud, either  
“ actual or legally constructive, though an onerous pur-  
“ chaser would be safe, an adjudger cannot take benefit  
“ by such fraud.

“ This point of distinction is precisely explained by  
“ Mr. Bell in a special section, as an existing principle  
“ of the law ; and he delivers the essential proposition  
“ in these words :—‘ Against creditors fraud has been  
“ ‘ thought entitled to full effect, where it is of that kind  
“ ‘ which lawyers have distinguished as originating the  
“ ‘ contract—*daus causam contractui*. In all such cases  
“ ‘ creditors, in taking the benefit of the property, are  
“ ‘ considered as adopting the fraud of the bankrupt, by  
“ ‘ which he acquired the property ;’ — a principle  
“ clearly comprehending the case of his keeping the  
“ property free of a conveyance or security, which but  
“ for the fraud would have affected it. Mr. Bell con-  
“ firms the statement by many authorities, and particu-  
“ larly by reference to the opinion of Lord Braxfield  
“ in the case of Thomson v. Armstrong’s Creditors,  
“ November 16, 1786, which indeed, though its autho-  
“ rity might be doubtful on any other ground, was  
“ plainly a sound and right decision on this principle.  
“ It was stated as the case of a conveyance to an agent  
“ with powers to sell and to apply the proceeds for the  
“ granter’s behoof. The disponee made up a title by  
“ charter and sasine, leaving out the qualification ; he

“ granted an heritable bond to one of his own creditors,  
 “ and others of them adjudged. The Court held the  
 “ statement to be an averment of intrinsic fraud, and  
 “ found, ‘ that the allegation of fraud is not relevant  
 “ ‘ against the heritable creditors, but found that it is  
 “ ‘ competent against adjudgers.’

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ But we apprehend that, in order to reach this  
 “ point, it is not necessary that there should be a case  
 “ established of criminal intention to commit a fraud.  
 “ We do not see that that was required in the case of  
 “ Thomson and Armstrong, or in any of the other  
 “ cases. But the much later case of Gordon v. Cheyne,  
 “ February 5, 1824, if it did not sanction the more  
 “ general doctrine that creditors as adjudgers take the  
 “ rights of the bankrupt *tanta et talia*, can stand on no  
 “ other principle than that, without any positive inten-  
 “ tion to commit a fraud, it would have been a fraud in  
 “ the bankrupt or his creditors to take advantage of the  
 “ form in which the right stood. Indeed the principle  
 “ is expressly laid down in the interlocutor of the  
 “ Court:—‘ In respect the petitioner, as trustee for  
 “ ‘ general creditors, who are neither purchasers nor  
 “ ‘ special assignees, adhere to the Lord Ordinary’s  
 “ ‘ interlocutor.’

“ Many other authorities could be referred to on this  
 “ point. It depends on a principle, which we imagine  
 “ must be fundamental in all law, that justice shall be  
 “ done between the parties in competition. Here the  
 “ defenders and the other lenders gave their money on  
 “ the faith of a specific security. Mr. Stuart either  
 “ believed that he had given it, or there was an inten-  
 “ tional fraud. There is no creditor who can say, that  
 “ he contracted with Mr. Stuart on the faith of the

INGLIS  
and others  
v.  
MANSFIELD.

10th Apr. 1835.

“ records, and that the lands were free ; for there was  
“ no attempt to make another security in a different  
“ form ; that would be a very different case : and the  
“ plain question is, whether creditors who followed  
“ solely the personal credit of Mr. Stuart are entitled  
“ to take advantage of that which, whether intentional  
“ or not, was a legal fraud, whereby his titles continued  
“ disencumbered, so as to hold the money of the de-  
“ fenders in the common stock, while they keep the  
“ security on the faith of which it was given ? We  
“ humbly think that there is principle enough in the  
“ law of Scotland to determine this in favour of the  
“ defenders, and that we trench on no point, either of  
“ the feudal or of the bankrupt law, in holding that the  
“ deed, which was in itself validly executed by Mr. Stuart,  
“ cannot be reduced by his creditors adjudgers to any  
“ such effect.

“ We must further observe, however, that the execu-  
“ tion of the deed in question ought not to be consi-  
“ dered as a voluntary act on the part of Mr. Stuart.  
“ It was an act which he was bound to perform in  
“ justice and honesty ; and an act which he might have  
“ been required by action to perform even after bank-  
“ ruptcy. In the case of Mitchell, the husband, by vo-  
“ luntary act, infest both himself and his wife in imme-  
“ diate contemplation of bankruptcy ; Mr. Gardener  
“ delivered his heritable bond and took infestment for  
“ the creditor after sequestration ; yet it was held that  
“ these were not voluntary acts, simply because they  
“ could have been compelled by action ; though the  
“ necessity of such process might, by delay, have de-  
“ feated the security, just as much as in the present  
“ case ; and in Maclean’s case the Court actually gave



“ decree against him after bankruptcy, to compel him  
 “ to execute a deed for effecting the security. No  
 “ creditor indeed opposed it, because the creditors knew  
 “ the fraud committed, and would not attempt to  
 “ avail themselves of it; and the Court must have been  
 “ convinced of it, riveted as it was by the very resist-  
 “ ance made by Maclean while no creditor interfered;  
 “ and, once more, observe the principle laid down in  
 “ the case of *More v. Allan*, that where the interference  
 “ of the bankrupt is only to do that which all parties  
 “ had understood to have been done at first, and on the  
 “ faith of which the money was advanced, the creditors  
 “ are not entitled ‘ to separate the security from the  
 “ ‘ advance.’ We doubt whether this last peculiarity  
 “ in the present case has been sufficiently attended to.  
 “ It is not the case merely of a contract on the faith of  
 “ a security to be granted, where the security in the  
 “ knowledge of all parties has been delayed and not  
 “ executed. It is the case of a specific contract to all  
 “ appearance rigidly carried into effect, but where the  
 “ party has been deceived into the belief that he has  
 “ got his security complete, and, without any fault of  
 “ his own, by positive misrepresentation he has got only  
 “ a security of a twentieth part of its value.

“ The question is, whether creditors can reduce the  
 “ deed of the bankrupt, made to give effect to the true  
 “ contract and the actual understanding, on the ground  
 “ that it was a fraud against them for him to grant it.  
 “ It was by a fraud (whether actual or constructive  
 “ signifies not), that the right was not made perfect at  
 “ first, and if the creditors were to succeed in reducing  
 “ the deed, they must take benefit by the fraud which  
 “ the bankrupt has endeavoured to correct. We are of

INGLIS  
 and others  
 v.  
 MANSFIELD.

10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ opinion that this they are not entitled to do ; for we  
“ can entertain no doubt that, taking the facts of the  
“ case as importing a legal fraud, it was a fraud dans  
“ causam contractui ; inasmuch as Mr. Stuart, soliciting  
“ the loan upon the tender of the special security of the  
“ whole lands in Dr. Coventry’s valuation, laid the basis  
“ of the whole contract on the fulfilment of that tender :  
“ without it there would have been no loan : there was  
“ no loan except on the faith that the pledge had been  
“ fulfilled.

“ It is mentioned, that a security had been sometime  
“ previous to 1823 given to a Mr. Brown, in the same  
“ terms with that originally granted to Mr. Walker.  
“ We apprehend, that this cannot at all enter into the  
“ present question. It does not appear, under what  
“ circumstances Mr. Brown may have contracted with  
“ Mr. Stuart. The law, at any rate, must be applied  
“ to the present case as it stands.

“ On the whole, our opinion is, that the defences  
“ ought to be sustained.

“ There is a specialty in the case, however, which  
“ ought not to be left out of sight. It appears from  
“ the third article of the condescence, that there  
“ were six parcels of lands, in which Mr. Stuart was  
“ not infeft, but which he held by personal right. But  
“ whatever may be said with regard to lands possessed  
“ by feudal title, we have always understood, that, in  
“ personal rights, creditors must be affected by the  
“ obligations of the bankrupt specially applicable to the  
“ lands. In the case of Thomson and Armstrong’s  
“ Creditors, for instance, there would have been no  
“ question at all if the bankrupt had not been infeft ;  
“ for the conveyance being substantially a trust, that

“ quality would have affected all creditors ; and num-  
 “ berless other illustrations might be given. In the  
 “ present case, the contract is so specific for a security  
 “ over all these lands, that although, whether through  
 “ fraud or error, it was not granted, it must be held,  
 “ that the bankrupt, continuing to possess the lands by  
 “ personal title, held them subject to a trust for the  
 “ benefit of the defenders to the extent of their debt ;  
 “ and the creditors cannot take these lands without  
 “ being subject to that trust obligation which was in  
 “ Mr. Stuart’s person. In every view, therefore, we  
 “ are of opinion, that, even though the Court should  
 “ not sustain the defence generally, the case of these  
 “ lands, held by personal title, ought to be separately  
 “ disposed of.”

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

The cause was now put out for advising by the Second Division.

*Lord Justice Clerk.*—“ Whatever opinion we may  
 “ entertain, the question is already decided by a  
 “ majority of the Court, and decree of reduction must  
 “ be pronounced. While, however, that must be the  
 “ result, as we have considered this case, and as it is  
 “ one unquestionably of great importance, I conceive it  
 “ to be our duty, in justice both to the case, to the  
 “ law, and to the parties, to give our opinions upon the  
 “ questions which are here raised.

“ My opinion, I must say, coincides with that of the  
 “ minority as to the main features of the case ; and, I  
 “ think, it will save a great deal of time in what I have  
 “ to say, to state, that I take the assumption of facts, as  
 “ contained, both in the note of Lord Moncreiff, and  
 “ in the preamble to the opinion by his lordship and

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ the Lord President, as a correct statement of the facts  
“ of the case.

“ On looking at the record with all the attention I  
“ can give it, I am decidedly of opinion, that it was  
“ actum et tractatum between Mr. James Stuart and  
“ the agent of Mr. Walker, that the former was to give,  
“ and the latter to receive, a valid, effectual, and com-  
“ plete heritable security, extending over every inch of  
“ the lands contained in the report and valuation of  
“ Dr. Coventry. I am most thoroughly convinced that  
“ it never entered into the contemplation, either of the  
“ borrower or of the lender, that the money was to be  
“ advanced on any security, except that of the whole of  
“ these ninety-five acres. I think that is luce clarius;  
“ and, if this be the case, the question comes to be, how  
“ is it that this bond of Professor Walker was limited  
“ only to the lands of what is called Hillside proper,  
“ and which, your lordships cannot overlook, consist of  
“ only five acres out of these ninety-five acres in  
“ Dr. Coventry’s valuation, and over which the bond  
“ under reduction extends?

“ It is correctly stated by Lord Moncreiff, that only  
“ certain titles were sent to the lender’s agent, and that  
“ the description of the lands corresponded generally  
“ with the survey made by Dr. Coventry.

“ The bond was accordingly made out precisely in  
“ terms of the titles; but it turned out that no  
“ materials were laid before the gentleman who pre-  
“ pared it, from which a doubt could have been enter-  
“ tained that the whole lands were not included under  
“ that description. If the titles of the whole ninety-five  
“ acres had been sent, and it had appeared that the

“ man of business to whom they had been sent, having  
 “ all the titles within his grasp, had made out a security,  
 “ leaving out a parcel of the lands, that would have  
 “ been a totally different question from the present.  
 “ Mr. Stuart, or those in his right, might, in such a  
 “ case, have been entitled to say, ‘ I told you to  
 “ ‘ examine the titles, and make out a good security,  
 “ ‘ and, if you have not done so, it is no fault of  
 “ ‘ mine.’

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ But it is clear that no materials were furnished to  
 “ the agent by which this deed could have been  
 “ rectified ; and there was nothing to show that it was  
 “ not completely effectual over the whole lands.  
 “ Matters went on in this way for some time, but then  
 “ the mistake was discovered, and that the security  
 “ extended only to five acres in place of ninety-five, as  
 “ contained in Dr. Coventry’s valuation. This having  
 “ been discovered, Mr. Stuart granted the new deed of  
 “ corroboration, covering the whole ninety-five acres,  
 “ which were originally understood to be comprehended  
 “ under the security to the defenders. It is under  
 “ these facts that the present action is brought for  
 “ reduction of the deed granted by Mr. Stuart, after  
 “ bankruptcy and sequestration, when he was out of  
 “ the country, proceeding on the narrative of what was  
 “ the intention of the parties in entering upon the  
 “ transaction, extending that security over the whole  
 “ lands, and making it effectual against them if he had  
 “ the power so to do. Infestment on this deed was  
 “ taken by the defenders before the infestment of the  
 “ trustee ; for although the latter had both the general  
 “ adjudication and a special adjudication, yet he was  
 “ not infest till posterior to the infestment of the

INGLIS  
and others  
v.  
MANSFIELD.

10th Apr. 1835.

“ defenders. These are the circumstances upon which  
“ we must proceed, and upon which our judgment  
“ must be formed.

“ Now, I must confess that it is impossible for me to  
“ doubt, that if by what took place at the time of the  
“ original transaction, in withholding from the agent  
“ for the lender all the titles except those of Hillside  
“ proper, it was intended by the granter to limit the  
“ security to the five acres, it would have been the  
“ grossest of all possible frauds, and one which could  
“ not have stood a moment’s discussion. There could  
“ have been no doubt of that being about the most  
“ palpable of all frauds, after what we have seen of the  
“ real treaty between the parties, and, therefore, I  
“ conceive it to be clear, that no fruits or benefits  
“ could follow on it in favour of the party guilty of it,  
“ or of any one deriving right from that party. But,  
“ seeing that, notwithstanding the defect in the security,  
“ (which I do not think ever was intended,) Mr. Stuart  
“ never endeavoured to avail himself of this blunder;  
“ and, when he, by his conduct, in fact, though pressed  
“ by his difficulties, says to the defenders, when you  
“ ask me to do what I intended to do from the  
“ beginning, I do it readily, I think the idea of per-  
“ sonal fraud is altogether out of the question. But  
“ then, again, while I have no idea of such personal  
“ fraud, I cannot doubt, that by withholding those  
“ documents regarding the rest of the estate, the  
“ neglect of which he was guilty is that which in law is  
“ held to be culpa lata quæ æquiparatur dolo.

“ Then the first question comes to be, Whether,  
“ under these peculiar circumstances, this transaction  
“ now sought to be reduced, which Mr. Stuart did enter

“ into by this bond of corroboration, is one which can  
 “ be cut down or rendered ineffectual under the statute  
 “ 1696? Upon this matter, I am of opinion, after con-  
 “ sidering deliberately the opinions of the consulted  
 “ judges, and, particularly, after a careful perusal of the  
 “ decisions upon which these opinions are rested, that  
 “ the act 1696 does not apply to this case.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835

“ It is admitted, on both sides, that the act 1621 is  
 “ inapplicable to the case. That is unequivocally ad-  
 “ mitted, and I am equally clear that the act 1696 does  
 “ not apply, and that there has been no violation of it.

“ My opinion is formed both upon the statute and  
 “ upon the decisions referred to. If the case of Bontine,  
 “ where the deed granted was merely covenanted to be  
 “ granted, but was not actually granted till after the  
 “ notour bankruptcy of the grantee, does not fall under  
 “ the act, as the First Division and the House of Lords  
 “ have found, I cannot see, and I defy ingenuity to  
 “ show, that this case falls under the statute. That case  
 “ seems decisive on the point, that if a security or con-  
 “ veyance be covenanted for at the time, being before  
 “ the sixty days, the act 1696 does not cut it down,  
 “ though granted within that term. If, then, neither  
 “ the statute 1621 nor the statute 1696 apply, on  
 “ what other ground can these deeds be challenged or  
 “ set aside? And that brings us to the second question,  
 “ Whether, under the bankrupt statute, or at common  
 “ law, this is a security which is reducible, and from  
 “ which no fruits or any profit can flow to the party  
 “ in whose favour it is granted.

“ Now, I beg to say, that notwithstanding all the  
 “ ability evinced in the opinions signed by the majority  
 “ of the consulted judges, I cannot get over the diffi-

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ culty, that where there is no interference with the  
“ principle that regulates the security of the records,  
“ we cannot and have no right to give our sanction to  
“ a doctrine that would shake to their foundation the  
“ rights of those who have transacted with an individual  
“ bonâ fide. It is not compatible with my views of the  
“ law regarding the security of the records, that either  
“ under the bankrupt statute, or upon any principle of  
“ common law, a personal creditor, who is not protected  
“ by the records, can take advantage of the fraud or  
“ culpa lata of the common debtor; and although it has  
“ been said, that under the act of sequestration the  
“ trustee (which means the creditors for whom he acts)  
“ takes the estate free from those obstacles that would  
“ oppose themselves in the person of the common debtor,  
“ and that the principle of tantum et tale does not apply  
“ to such a case, I must say, that that is not made out  
“ to my satisfaction; and that it appears to me, from  
“ the decisions, it can be shown, that when there is no  
“ interference with the security of the records, and that  
“ there was culpa lata, or gross fraud, the creditors are  
“ not entitled to found upon it. If under the adjudica-  
“ tion in favour of the trustee, a title is made up, and  
“ infestment previously taken upon it, that comes pre-  
“ cisely within the right the party has to vindicate his  
“ preference founded upon the records. But so long as  
“ the right stands under an adjudication, not made  
“ heritable, and not entering the records, I apprehend  
“ that the trustee or creditors cannot take benefit from  
“ the fraud of that party whose act is brought in ques-  
“ tion. Wherever a party is secured by infestment,  
“ that will be effectual; but I do not think that, where  
“ no infestment has been completed, the adjudication



“ can compete with the established right or the infest-  
 “ ment of another party.

INGLIS  
 and others  
 v.  
 MANSFIELD.

10th Apr. 1835.

“ My Lords, in regard to what is stated, both in the  
 “ cases for the parties, and in the opinions of some of  
 “ the consulted judges, as to the effect of certain deci-  
 “ sions which are said not to be authoritative, and to  
 “ have been subsequently superseded, I apprehend that  
 “ such observations must be taken with great qualifica-  
 “ tion; and, particularly, in regard to the dictum in  
 “ the report of the case of Ross of Kerse, as to the case  
 “ of Thomson, it appears to me that it did not take into  
 “ view the whole circumstances of Thomson's case.  
 “ For, on looking into the case, and keeping in remem-  
 “ brance the fact, that Lord Braxfield was on the bench  
 “ when it was decided, it struck me as a remarkable  
 “ circumstance, that if it had been supposed the Court  
 “ meant to say that the law laid down in Thomson's  
 “ case was fundamentally wrong, Lord Braxfield, who  
 “ was in his vigour at the time, and who was present at  
 “ that decision, should not have disapproved of it;—to  
 “ me, my Lords, it is inconceivable that he would have  
 “ stultified himself by saying the judgment in the case  
 “ of Thomson was erroneous in point of law.

“ I must say, therefore, as to these obiter dicta, which  
 “ are founded on as setting aside the whole doctrine of  
 “ tantum et tale, in reference to adjudications, that they  
 “ rest on a very slender foundation.

“ In the case of Mitchell, the Court gave effect to  
 “ the plea of the adjudger infest, and I think that was  
 “ quite right.

“ But I pray your Lordships to attend to that case  
 “ of Thomson, where the Court found, as their judg-  
 “ ment expressly bears, that while the allegation of fraud

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ was not relevant against heritable securities and infeft-  
 “ ments, it was relevant as to the creditors adjudgers.  
 “ If you look to the report of the case, and what is there  
 “ stated, as observed on the bench, it is plain that the  
 “ Court were not trying or deciding the question of all  
 “ cases of adjudications, even when infeftment followed.  
 “ So far from that, the judgment traces the distinction  
 “ between those infeft on heritable securities and ad-  
 “ judgers not infeft. And, accordingly, there occurs  
 “ this passage in the opinion of the Court,—‘ The  
 “ ‘ adjudging creditors stand, however, in a different  
 “ ‘ predicament; for, as it had been found by decisions,  
 “ ‘ which, for the stability of the law, ought not to be  
 “ ‘ departed from, they must take the right of their  
 “ ‘ debtor tantum et tale as it was in his person.’  
 “ Nothing can be more explicit or decisive.

“ We have been referred to an opinion, said to have  
 “ been expressed in the case of Ross of Kerse, in these  
 “ terms:—‘ And it was observed, that what had given  
 “ ‘ occasion to so ample a discussion was an opinion  
 “ ‘ expressed on the bench in the case Thomson against  
 “ ‘ Douglas, Heron, and Company,’ that ‘ adjudging  
 “ ‘ creditors stand in a different predicament from  
 “ ‘ disponees, as they must take the right of their debtor  
 “ ‘ tantum et tale as it is in his person, (Fac. Coll.  
 “ ‘ Nov. 15, 1786,) an opinion now stated to have been  
 “ ‘ erroneous.’

“ Now, I beg to say, that although this professes to  
 “ state what passed on the bench in the case of Thomson,  
 “ when Lord Braxfield was one of the judges, it does  
 “ not state the distinction, as referred to in that former  
 “ report between heritable creditors infeft and ad-  
 “ judgers; and I must think that the remark in this

“ case of Ross is in itself erroneous. The decision in  
 “ the case of Ross turned upon a totally different prin-  
 “ ciple, and did not interfere with that of Thomson.  
 “ In the same way, in the case of Wylie, it is said the  
 “ Court returned to the correct view, where it was  
 “ decided that a pactum de retrovendendo, contained  
 “ in a back-bond, was merely personal, and not effectual  
 “ against creditors.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 ———  
 10th Apr. 1835.

“ But we have a much later authority in the case of  
 “ Gordon v. Cheyne, decided in 1824, where it was  
 “ found, as stated in the rubric, that in a latent trust the  
 “ claim of the truster is preferable to that of the creditors  
 “ the trustee under a sequestration. This decision was  
 “ pronounced by the First Division in 1824. My  
 “ Lords, looking to the opinions in that case, and the  
 “ judgment, so far from thinking from what is there  
 “ stated, that the law in the case of Thomson was wrong,  
 “ I think it is conclusive of the contrary, the Court  
 “ having there used almost the very same words in their  
 “ judgment. And really, from that last judgment on  
 “ the point, I cannot find that there is any thing to  
 “ raise a doubt in regard to the general rules of law and  
 “ justice applicable to the present case; for I ask, on  
 “ what ground could that decision be right, if an adju-  
 “ dication, which has not been perfected by an infest-  
 “ ment entered on the records, can put the trustee in a  
 “ better situation, or give him a better right than that of  
 “ the person from whom he has adjudged? As to the  
 “ views and dicta thrown out in these cases that I have  
 “ before referred to, I see some of them noticed by  
 “ Mr. Bell; but I must deny that there is any principle  
 “ in them to which I can assent.

“ To maintain that, by a process of adjudication, you

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ are to place a party in a better situation than him  
“ whose right is adjudged, is a proposition in which I  
“ say there is no solidity whatever. It is contrary to  
“ every idea of justice that I have been taught, and I  
“ think it would be dangerous for your Lordships to  
“ throw out even a doubt that would interfere with  
“ this judgment in the case of Gordon. There the  
“ Court were of opinion, ‘ that the principle of the  
“ ‘ case of Redfearn applied exclusively to the case of  
“ ‘ purchasers founding on an intimated assignation, and  
“ ‘ could not be extended to a general body of creditors  
“ ‘ under a sequestration, and that the authority of that  
“ ‘ decision was not affected by the subsequent decision  
“ ‘ in the case of Macombie. The general body of cre-  
“ ‘ ditors could only take the rights tantum et tale as  
“ ‘ they stood in the person of the bankrupt.’ That  
“ is the embodied opinion of the Court in that case,  
“ and I hold it to settle the point.

“ Is there any one of your lordships who can for a  
“ moment entertain a doubt, that if Mr. Stuart had  
“ continued solvent, and master of his own property,  
“ and having full power over it—that he, on this defect  
“ in the security being discovered, could not instantly  
“ have been compelled to complete a sufficient one to  
“ these defenders, in conformity with the admitted  
“ covenant of parties? I apprehend that no one could  
“ entertain for an instant a contrary opinion. It would  
“ have been impossible to throw the burden upon the  
“ agents of the borrower, or to say that they were to  
“ suffer. He must have been bound himself to com-  
“ plete that security, which he had covenanted and en-  
“ gaged to give. But if that was the situation in which  
“ the matter stood before his bankruptcy, are these

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ parties, the pursuers, under the bankrupt statute,  
“ entitled to say, that while they take that which he had  
“ at the time, yet, having done nothing to perfect their  
“ right by infestment, the bond of corroboration must be  
“ reduced, leaving the defenders the security over the  
“ five acres, while they, the creditors, take possession of  
“ the ninety acres? I cannot acquiesce in such a pro-  
“ position. If there had been other heritable creditors  
“ infest in these ninety acres before the defenders, that  
“ would have been a different question, and a matter  
“ which we could not have touched. But that is not  
“ the case here; there are no persons saying that  
“ they have a right under infestment to these ninety  
“ acres. We have merely the personal creditors, found-  
“ ing on the adjudication to the trustee not completed  
“ by infestment, and I conceive that, upon every prin-  
“ ciple of common law as well as of equity, the securities  
“ in favour of the defenders are effectual.

“ Your lordships in the additional cases have a deci-  
“ sion referred to, namely, that of Kelty. I looked to  
“ that case, of which I had full notes of what passed when  
“ it was before us; and I must say, that Mr. Jameson has  
“ given a most correct account of it. That decision, I  
“ apprehend, establishes this, that if there was nothing  
“ illegal in granting the deed of corroboration, which  
“ was merely for the purpose of perfecting the trans-  
“ action between Mr. Stuart and the late Mr. Walker,  
“ according as it had ab origine been covenanted, that  
“ deed is unchallengeable, and cannot be set aside.  
“ The case of Kelty is in this respect directly in point.

“ There is nothing in the bankrupt act which pre-  
“ cludes a party, who has a warrant, from taking in-  
“ festment upon that warrant, and making himself secure,

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ prior to the infestment of the trustee ; and there is  
“ nothing in the present case which I think ought to  
“ warrant the reduction of these securities. I am not,  
“ however, insensible of the difficulties that may ap-  
“ pear to arise from the Court being supposed to de-  
“ clare, that, notwithstanding a regular sequestration has  
“ been awarded, and an act of adjudication pronounced  
“ in favour of a trustee, a bankrupt is still left at liberty  
“ to go on granting securities in this way. That diffi-  
“ culty would have led, in my mind, to the propriety  
“ of carefully wording any judgment sustaining the  
“ security in question ; for, if we merely repelled the  
“ reasons of reduction, it might have been said that we  
“ gave rise to a dangerous principle in favour of bank-  
“ rupts ; and in order to avoid any such idea, I would  
“ have proposed an interlocutor proceeding on the  
“ grounds I have stated, being perfectly clear that this  
“ adjudging body of creditors, through their trustee, are  
“ not entitled to take these ninety acres, freed and re-  
“ lieved from the inherent obligation of making effectual  
“ the security that was settled ab origine, and that they  
“ are not entitled to say, we will hold these lands to the  
“ extent of ninety acres, but will not fulfil the original  
“ obligation upon which the security was granted. If,  
“ therefore, your lordships of this Division were in a  
“ capacity to pronounce a judgment, which we, however,  
“ are not, the opinion of the majority of the judges  
“ being against that view, I should have submitted to  
“ your lordships, that you should pronounce a judg-  
“ ment on the special grounds I have stated, finding, in  
“ fact, that as the pursuer, for behoof of the personal  
“ creditors of Mr. Stuart, is not, under the circum-  
“ stances of the case, entitled to reap any fruits from

“ this action, it is unnecessary to decern in the conclu-  
 “ sions of reduction. For I cannot consider it as con-  
 “ sistent with the principles of eternal justice, that, in a  
 “ case where no man can entertain a doubt of what was  
 “ actum et tractatum, when the securities were stipu-  
 “ lated for, and meant and believed to have been given,  
 “ any person, coming in right of the borrower, can take  
 “ advantage of his culpa lata.”

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

*Lord Glenlee.* — “ If we are to find that the act  
 “ 1696 was to apply to a case like this, I think the  
 “ decision would be one of the most dangerous that  
 “ could be pronounced. I do not think that act ap-  
 “ plies at all. The reason is stated very distinctly by  
 “ Lord Moncreiff why that does not apply ; and it does  
 “ not seem to me to be so clearly noticed by the other  
 “ judges who differ in opinion from him.

“ The reason why the act does not apply to this case  
 “ in my mind is, that it is not a case where the party  
 “ lending the money knew that he had not got the  
 “ security bargained for, and, knowing this, allowed it  
 “ to lie over without getting it, on taking the means he  
 “ might have taken to get it completed ; for in such a  
 “ case it would be difficult to say that he was more than  
 “ a creditor who trusted to get a security. But here the  
 “ creditor thought he had got that security all along,  
 “ and it was thoroughly relied on both by the borrower  
 “ and lender ab initio. Where a party knows he has  
 “ not got the security agreed on, but trusts to the  
 “ honour of the debtor to grant it, there may be a  
 “ question how far, upon the debtor’s bankruptcy, a  
 “ deed having for its purpose to give that security,—the  
 “ deed being granted after bankruptcy,—could compete

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1895.

“ with the trustee’s right under the sequestration ; but  
“ where the party never dreamt that he had not got  
“ the security stipulated, and upon which he lent his  
“ money, that is a case of a very different nature.  
“ Mr. Bell has a distinct chapter in regard to the rights  
“ of parties and deeds challengeable under the act  
“ 1696, and he there points out the difference ; and  
“ states most distinctly the law to be, that where the  
“ party understands that he had got the security at first,  
“ but, in point of fact, had not got it, and the bankrupt  
“ interfered only to do what both parties understood  
“ had been done originally and upon the faith of which  
“ the money was lent, the general body of creditors are  
“ not entitled to take the benefit, and set aside the  
“ security under the act : and he quotes an English  
“ case, where a bill of exchange was delivered for a  
“ valuable consideration, but the debtor forgot to indorse  
“ it. It was there held that he might indorse it after  
“ bankruptcy. In the same passage Mr. Bell goes on  
“ to ask :—In Scotland, if the debtor had been applied  
“ to to indorse such a bill, upon which he had thus  
“ raised money, is there not reason to believe that the  
“ case would have been held not to fall under the statute  
“ 1696 ? I do not know whether this would be so, but  
“ certainly the present is not a case where the creditor  
“ can be told, you merely trusted to get a security, and  
“ did not ; and therefore I have no hesitation in saying,  
“ that to me it appears that the statute 1696 has nothing  
“ to do with the case at all.

“ As to the statute 1621, it is admitted that the first  
“ branch of it does not apply to this case ; and, indeed,  
“ there could be no doubt about that. As to the second



“ branch, I think it has an application, but it would be  
 “ a good defence on that, if it could be made out that  
 “ the right was preferable, though not completed.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ But the creditors say that the right here was granted  
 “ after sequestration ; still they must, nevertheless,  
 “ stand in the same situation in which they were before  
 “ it was granted. No doubt Mr. Stuart could do  
 “ nothing to better the right of the defenders ; but if  
 “ they could in respect of their prior right have  
 “ opposed the trustee, had he been adjudging the lands,  
 “ then the trustee would have no interest to reduce the  
 “ bond of corroboration. Then on this, on the whole,  
 “ I agree with your lordship in the views you have  
 “ expressed. It appears to me that there is a mistake  
 “ on both sides, and particularly on the part of the  
 “ pursuer, as to the true nature of the doctrine of tan-  
 “ tum et tale. It is argued as if, in the case of  
 “ Thomson, it had been held that the general creditors  
 “ were in the situation of having incurred a passive  
 “ title, and that it could meet extrinsic claims ; I am  
 “ persuaded that there was no idea of that in the minds  
 “ of the judges at the time. The principle seems to be  
 “ this, that where the objection attaches to and affects  
 “ the title of the bankrupt, where it actually corrupts  
 “ and taints his own title, although it is not to be  
 “ listened to in a question with a completed infetment,  
 “ yet in regard to questions with the general creditors  
 “ taking the bankrupt’s right as it stood in his person,  
 “ it may affect them, although the qualification does  
 “ not enter the record. In that view, I see nothing  
 “ against the doctrine.

“ In the case of Ross of Kerse there was no alle-  
 “ gation of the title of the bankrupt (whose right was

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ adjudged) in itself being bad ; but it was said, that  
“ if he granted such and such a bond he would incur  
“ an irritancy. The answer made was, that is not a  
“ cause of absolute vitiosity in his title; it is merely a  
“ cause for setting aside the right on separate and  
“ extraneous grounds.

“ In the same way, in the case Wylie v. Duncan,  
“ there was no vitiosity alleged in the bankrupt’s title.  
“ The bankrupt held the right just as was intended,  
“ and had merely given a personal back-bond, which  
“ could not be good against creditors, although the  
“ doctrine of tantum et tale were admitted. It is said  
“ these are all departures from the doctrine laid down  
“ in Thomson’s case ; but they are not so, unless that  
“ case be misunderstood, so as to hold it laying down  
“ that the personal creditors are liable to every claim  
“ whatever against the bankrupt, which it never meant  
“ to do ; and I think the objection to the doctrine of  
“ tantum et tale has been misapplied here by the  
“ trustee. As to how far this case can be assimilated  
“ to that of Thomson, it is a different question ; the  
“ character of the facts in Thomson’s case seems to me  
“ not to be very different from the present, the facts  
“ of which are undeniable, although their character be  
“ viewed differently by the different judges. Some of  
“ them think that Mr. Stuart was only under an obli-  
“ gation to grant the security ; but that is not, in my  
“ mind, the correct view. He had not only promised  
“ to give, but actually represented himself as having  
“ given, the security, and, by his own conduct, led  
“ these creditors to believe that they had got right to  
“ the whole ninety-five acres under their original bond.  
“ That was the true state of the case ; that, by his own

“ act and deed, this limited and vitious title was given,  
 “ but firmly relied on by the lenders, as having been  
 “ effectual over the whole of the lands. I agree in  
 “ the opinion, that, ab initio, there was no machinatio  
 “ to deceive ; but the question is, Whether, by his  
 “ tortious act, he misrepresented what was done, and  
 “ led the lender to believe he had got the security ? As  
 “ to this I have no doubt at all.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ Supposing, in Thomson’s case, all had been  
 “ adjudgers, I do not see it would have made any  
 “ difference. The opinions there go merely on the  
 “ fact of an omission of the trustee to insert the clause  
 “ qualifying his right in the charter of resignation.  
 “ Now, in that view, where is the great difference  
 “ between that and the present ? Why, really, I think,  
 “ in principle at least, they seem very nearly connected.  
 “ I doubt if there was held there to have been any  
 “ machinatio to deceive ab initio, but it was considered  
 “ enough to say that the title sought to be adjudged  
 “ was tortiously held, and contrary to what the true  
 “ state ought to have been.

“ In regard to the act of sequestration, I am not  
 “ aware that it is to be understood as giving any  
 “ supereminent right to the trustee, to what would  
 “ have arisen from an ordinary adjudication by cre-  
 “ ditors. Then if there had been no sequestration at  
 “ all here, but merely adjudgers, would the authority  
 “ and principle of Thomson’s case not apply ? If an  
 “ adjudication only had been raised, that moment the  
 “ creditor in this bond would have become alarmed, and  
 “ found out what had happened, — that they had not  
 “ got the full security ; they would have opposed the  
 “ adjudication, and decree would only have been pro-

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ nounced, reserving objections contra executionem;  
“ and then the creditor in the bond would have been  
“ heard, and would have prevailed, although, if he had  
“ taken no steps, and allowed the adjudgers to be infest  
“ before him, he would have been excluded. If infest-  
“ ment had followed in favour of the trustee here, the  
“ case would have been altered. But when there is no  
“ such infestment, is this act of adjudication to run a  
“ muck against all creditors? Is it reasonable to say,  
“ that the act of sequestration is to take away what,  
“ but for the sequestration, these defenders would  
“ have got ?

“ The 29th section of the statute bears in explicit  
“ terms that the adjudication shall convey every right,  
“ title, and interest, which was formerly in the bank-  
“ rupt, to be now in the trustee ; and at the close of the  
“ section it is expressly declared, that if the bankrupt’s  
“ title happens to be entailed, or otherwise of a limited  
“ nature, the conveyance to be executed by him, or the  
“ decree of adjudication obtained by the trustee, shall  
“ only be understood to carry that right and interest in  
“ the estate which the bankrupt himself has, and no  
“ farther. This is very like a reservation of all objec-  
“ tions to an adjudication contra executionem, and, of  
“ course, reserving the creditors’ claims of preference.  
“ I cannot conceive the statute to give a stronger effect.  
“ In the case of Wauchope v. Duke of Roxburgh’s  
“ Trustees, certain lands were not specially included in  
“ Duke John’s trust deed, and Duke William took  
“ them up. His creditors were leading adjudications,  
“ when Wauchope raised an action claiming them as  
“ Duke John’s lands and objecting to the adjudications ;  
“ decree was given reserving all objections contra exe-

“ cutionem. Afterwards Wauchope succeeded in his  
 “ claim. Now, suppose these facts to have occurred in  
 “ the case of a trader, would a sequestration have at  
 “ once extinguished Wauchope’s interest, claiming as  
 “ Duke John’s trustee? I rather think not. On the  
 “ whole matter I concur in the opinion just delivered,  
 “ that the reduction should be dismissed on the ground  
 “ that there is no sufficient interest in the trustee.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

“ I forgot to notice one point, viz. the difference be-  
 “ tween the lands in which Mr. Stuart was infest and  
 “ those in which he was not infest, in regard to which  
 “ last the objection founded on the doctrine of tantum  
 “ et tale applies very strongly.”

*Lord Cringletie.*—“ I confess that I agree with the  
 “ majority of the judges who have given us their opi-  
 “ nions. I cannot see how this act and deed of  
 “ Mr. Stuart can give the smallest preference to the  
 “ defenders. Whether they have any preference aliunde,  
 “ is another question. Suppose the trustee had got  
 “ himself infest before the infestment of these other  
 “ parties, he would have been successful beyond all  
 “ doubt; but if so, I do not see that what Mr. Stuart  
 “ did after his bankruptcy can have the least effect in  
 “ depriving the trustee of his preference. I think the  
 “ bankrupt act is express upon this point, and de-  
 “ clares, in totidem verbis, that a bankrupt cannot do a  
 “ single act after his bankruptcy to affect his general  
 “ creditors. His hands are tied up, and the estate is  
 “ carried to the trustee by the act of sequestration, be-  
 “ yond the control or power of the bankrupt. The  
 “ trustee here obtained a special adjudication, and he  
 “ was certainly entitled to go on and get himself infest.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ In a competition among creditors every one is entitled  
“ to ameliorate his condition if he can, but this must  
“ be done without any assistance from the bankrupt.  
“ An adjudger is entitled to the benefit of litigiousity,  
“ which inhibits the debtor from doing any deed to  
“ prejudice the right of the adjudger to complete his  
“ right, if he do so without such delay as the law con-  
“ siders to place him in morâ. At common law, there-  
“ fore, independent of the bankrupt statute, the pursuer  
“ was entitled to infest himself on his adjudication, and  
“ could not be prevented nor prejudged by any volun-  
“ tary act of Mr. Stuart. But how was he defeated?  
“ Why, by these other parties proceeding contrary, as  
“ I apprehend, to the common principles of litigiousity  
“ and of law. From the moment the sequestration was  
“ awarded, all Mr. Stuart’s writings and title deeds fell  
“ by law to be under the charge of the trustee, for  
“ behoof of the creditors at large. But what takes place  
“ here? Mr. Gordon, the agent for the defenders, ob-  
“ tains wrongous access to them, passes an infestment in  
“ favour of Mr. Stuart, and prevails on him to grant  
“ the deed under reduction. It is quite clear that if  
“ there is any foundation for the claim of preference of  
“ the defenders, such claim must rest on grounds quite  
“ independent of the security given by Mr. Stuart after  
“ bankruptcy, which must be set aside. It will be ob-  
“ served that another creditor (a person of the name of  
“ Brown) advanced to Mr. Stuart money on precisely  
“ the same security with Walker, while he should have  
“ got the same sort of security as was expected by  
“ Walker. Now, would it not be highly absurd and  
“ unjust, if Mr. Stuart could, by any deed after seques-

“ tration, prefer the one of them to the other, when  
 “ both were in *pari casu* in lending their money and  
 “ stipulating for security ?

INGLIS  
 and others  
 v.  
 MANSFIELD.

10th Apr. 1835.

“ If there be any thing like a separate right in the  
 “ person of the defenders, what is to hinder them from  
 “ claiming under the sequestration ? If they have such  
 “ right they will get the benefit of it there ; but if they  
 “ have not, I have no notion that they can get it  
 “ through the deed of Mr. Stuart.

“ I think there was considerable negligence on the  
 “ part of these creditors, the defenders ; for, when they  
 “ saw that the description of the lands did not com-  
 “ prehend all that was contained in Dr. Coventry’s  
 “ valuation, they should have asked the question at  
 “ Mr. Stuart, how this had happened ? and if the ques-  
 “ tion had been asked, I suppose he would have  
 “ answered it at once. Then again, a search of en-  
 “ cumbrances was furnished which might have shown  
 “ them the mistake. We have not seen that search.  
 “ What does it contain ? Is it limited to Hillside  
 “ proper, or what lands does it embrace ? Stuart may  
 “ have been much to blame, but I think there was also  
 “ considerable remissness on the part of the lenders.  
 “ Supposing it was owing to negligence that the deeds  
 “ were not complete, what does negligence amount to  
 “ more than an obligation ? I think that Stuart, after  
 “ the sequestration, was fettered and could not grant  
 “ such deeds.

“ But what after all, even at the most, do the cir-  
 “ cumstances constitute more than obligation to grant  
 “ a deed ? They go no farther. Now, suppose there had  
 “ been such an obligation five years ago by Mr. Stuart  
 “ —but he does not fulfil the obligation till within sixty

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ days of his bankruptcy—would that have done? I  
“ think it would not. Upon the whole I agree with  
“ the majority of the judges, that the deeds must be  
“ reduced.”

*Lord Meadowbank.* — “ When the case originally  
“ came before the Court, I entertained the same opi-  
“ nion as Lord Cringletie; but now my opinion has  
“ been changed, and I concur with that which has been  
“ expressed by your lordship; and as I have nothing  
“ to state which has not been noticed, I need not say  
“ more.”

*Lord Justice Clerk.* — “ I think it would be better  
“ that the other judges should be consulted in framing  
“ the interlocutor to be pronounced.”

The Court, on the 11th of July 1833, pronounced this  
interlocutor: — “ The Lords, having resumed considera-  
“ tion of the cause, with the opinions of the Lords of  
“ the First Division, and permanent Lords Ordinary,  
“ sustain the title of the pursuer to insist in this action:  
“ Find, that the defenders have not produced a title  
“ sufficient to exclude the action. Reduce, decern, and  
“ declare, in terms of the libel: Find the defenders lia-  
“ ble in expences.”<sup>1</sup>

Mr. Walker's trustees appealed.

*Appellants.* — 1. The appellants assume what is al-  
ready proved, or at least may be proved, as stated in the  
record: — “ 1st, That there was a bonâ fide agreement  
“ concluded between Mr. Stuart and Mr. Gordon, as  
“ agent of Professor Walker, by which the sum of  
“ 6,000*l.* was to be given in loan by the latter, along

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<sup>1</sup> 11 S., D., & B., 813.



“ with two other sums to be lent by other parties,  
 “ through Mr. Gordon, making in all 10,500*l.*, on the  
 “ express condition of obtaining an adequate and com-  
 “ plete heritable security; 2d, That that agreement was  
 “ specific, to the effect that the security should extend over  
 “ the whole lands comprehended in the reported valua-  
 “ tion by Dr. Coventry, produced.” They also assume,  
 that it is proved that they were induced, without any fault  
 upon their part, by the misrepresentations of Mr. Stuart,  
 to believe that the security actually given embraced the  
 whole amount of security for which they had stipulated,  
 and which Mr. Stuart had become bound to give; that  
 is to say, the whole “ lands, plantations, &c., of Hillside,  
 “ belonging to James Stuart, esq., of Dunearn,” which  
 are minutely specified under this title in Dr. Coventry’s  
 valuation, and which extend to about ninety-five acres;  
 and, 3dly, They assume, that the imperfection of the  
 description in the original security (if it shall be held to  
 be so imperfect as not effectually to include within that  
 security all the lands which were represented as being  
 comprehended within this description) was occasioned  
 either by the actual and intentional fraud of Mr. Stuart,  
 or by that *culpa lata quæ æquiparatur dolo*. It does  
 not appear to be of any importance whether there was  
 intentional fraud, or merely the most gross and extreme  
 degree of *culpa lata*. Now, although a purchaser of a  
 proper feudal right is not liable to the fraud of the seller,  
 yet such fraud is completely available against an ad-  
 judger.

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

Accordingly, the case of a *bonâ fide* purchaser, who  
 makes his bargain and advances money solely upon the  
 faith of the records, and who is entitled to trust to those  
 records, has always been distinguished from the case of

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

a personal creditor, who originally trusts merely to the personal security of the debtor, and not to the faith of the records, and who, when he comes to lead an adjudication, can by his diligence take no broader or better right than the debtor himself truly had, for he neither trusts nor is entitled to trust to these records. If that be the ground of distinction, it is manifest that it is totally immaterial whether the property attempted to be carried off by adjudication was originally the absolute property of the creditor, or was disposed to him by some third party, by a disposition *ex facie* absolute, although, truly, not intended to be so. In both cases the party appears the absolute proprietor upon the record. In both the question is, whether his right be not purely a limited right at the date of the adjudication, and if the limitation, although not appearing upon the record, affects an adjudger in the one case, so it must affect it in the other. This distinction is noticed by all the writers on the law of Scotland, and has been recognised by the decisions.<sup>1</sup>

In like manner, creditors are liable to extrinsic obligations, which limit or qualify the right of their debtor, although he should appear *ex facie* to be absolute proprietor. This was solemnly decided in the case of *Gordon v. Cheyne*.<sup>2</sup>

The authority of this decision is not denied: but it is said, in the first place, the rule is different in regard to heritable property; and, 2dly, That it does not overturn the authority of prior decisions, by which it is said to

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<sup>1</sup> 4 Stair, 40. 21; 1 Bankton, 10. 65; Stewart's Answer to Dirleton, voce Comprising; Ireland v. Neilson, 8 Feb. 1755; 5 Brown's Sup. 286; Gibb, 25 July 1766; Mor. 909; Hailes, 100.

<sup>2</sup> 5 Feb. 1824. 2 S. & D. 566, new edition; 675, old edition.

have been fixed, that creditors adjudging incorporeal rights do not take them *tantum et tale*, or subject to all the obligations of their debtor, the bankrupt. There appears to be neither principle nor authority for the first of these observations. It is clear that the only difference between incorporeal rights, passing by assignation, and heritable rights, requiring infeftment, so far as concerns the point in dispute, arises from a regard to the faith of the records, and, consequently, can have no application where the creditors do not ground their claim on a previous infeftment. But this not being the case in the present instance, the appellants cannot discover any answer to the opinion of the minority of the Court, that the case of Gordon and Cheyne is conclusive; nor do the prior decisions, and especially that of Buchan v. Farquharson<sup>1</sup>, fix that creditors taking by adjudication do not adjudge an incorporeal right *tantum et tale* as it stood in the debtor. In that case, the judgment ultimately turned upon the priority of the completion of the right; there was a sequestration in competition with an assignation of a personal bond. At that time the sequestration had not the same effect that it has at present, as an intimation, and the assignation of the bond being intimated before the trustee completed his title, the question arose, whether the trustee was entitled to reduce the assignation? One defence was, that the creditors took the right subject to the obligation to assign, and that was sustained by one interlocutor of the Court. But afterwards it was doubted whether the doctrine of *tantum et tale* could be carried so far; and the Court

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

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<sup>1</sup> 24 May 1797. Mor. 2905.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

ultimately decided, that there was nothing to prevent the creditor from completing his assignation, and that, if he did so before the trustee completed his title, he must prevail. The case, therefore, goes no farther than to recognise the distinction between that defect which touches the title itself, and a mere personal objection grounded on an extrinsic obligation, and not inferring either fraud or culpa lata in the bankrupt. For a bankrupt who has come under a personal obligation to convey a specific subject, and fails to complete the conveyance until he become bankrupt, is not guilty of fraud or culpa lata; and the creditors, in taking what they can by legal diligence, are not therefore under any necessity of supporting their case by taking advantage of such fraud or culpa. Accordingly, this distinction is admitted by the majority of the Court, between the case of Buchan and the case of Gordon.

But it is said, that even the case of fraud could not be available, and the case of the Duke of Norfolk and others against the Trustee for the annuitants of the York Buildings Company<sup>1</sup> is cited in support of this position. But the report of the decision is altogether silent as to this supposed ground; and the parties, whose bonds of annuity were set aside, never pretended that they had been deceived; or that their ignorance “had been taken “ advantage of.” All that appears in the first interlocutor as its ground is, that they, from not being acquainted with the laws of Scotland, had “erroneously “ given up” the old bonds, and taken new bonds in their place. The case was not, in the pleadings, treated even

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<sup>1</sup> 26th June 1752, Elchies, “Competition,” No. 12. Mor. 7062.

by the defenders themselves as a case of deception, but only of great error on their part; and it was justly held by the Court, that mere error, without any fraud on the part of the bankrupt, ought not to have the effect of validating a bad security, in competition with a right which was unobjectionable.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

But even if this case had supported the view which is taken of it, it never could control or weaken the authority of the great mass of decisions, both before and subsequent, in which it has been found that fraud is pleadable against creditors, and that where it is of that kind which amounts to a vitium reale, tainting the title itself, the creditors cannot take advantage of it.<sup>1</sup>

In particular, in the case of Thomson v. Douglas, Heron, and Co.<sup>2</sup> it was expressly found, that adjudging creditors, who had not completed their title by infeftment, could be met by an objection of fraud.

The subsequent case of Pearce v. Russell and others, in 1791, is no exception to the doctrine. The creditors there took, by the adjudication, a title in itself unqualified; their debtor had not even put himself under any obligation. It was a mere competition between them and the heirs of entail, who had failed to take any step whatever to make the entail effectual; and it is therefore impossible to hold that this case overrules the doctrine, involved in the case of Thomson, that a fraudulent or gross culpa on the part of the bankrupt cannot be taken advantage of by his creditors.

The case of Wylie v. Duncan, 8th December 1803, is equally inapplicable, for the same and even for stronger

<sup>1</sup> See cases referred to, 2 Bell, 289, &c.—See also cases, Brown's Synopsis, voce Fraud, 765.

<sup>2</sup> 15th November 1786. Mor. 10,229.; Hailes, 1002.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

reasons. There a pactum de retrovendendo not appearing in the title, but contained in a separate missive, was found ineffectual against creditors infest, as a mere personal obligation. There was no fraud, or even culpa, committed by the bankrupt; and before the question arose, or the holder of the personal obligation had taken any steps to make it effectual, he had not only allowed the estate to be adjudged to the trustee, but also the latter to complete his title by infestment, and to enter into a contract of sale with a third party.

But at all events it is clear that the parcels of land, to which Mr. Stuart had merely a personal right, cannot be taken by the respondent otherwise than subject to the exemption pleadable against Mr. Stuart himself. The doctrine is well explained by Mr. Bell<sup>1</sup>, who, after pointing out the effect of obligations where the debtor was infest, observes :—“ The rule respecting personal rights  
“ to land is, that the conditions and qualities inherent  
“ in the constitution of the right are effectual against  
“ third parties, both purchasers and creditors, while the  
“ right is not made real by infestment. If, therefore, a  
“ person hold a conveyance to land, qualified by a  
“ limitation as of trust, or a condition as of pre-emption,  
“ and on which no infestment has taken place, his cre-  
“ ditors must take the right as he has it.” And he refers to various cases where this distinction has been enforced, adding, that “ the real right is freed from  
“ the condition, which becomes a personal obligation  
“ merely, when sasine is taken.” The cases of *Burden v. Whiteford*<sup>2</sup> and *Ireland v. Neilson* are direct authorities on this point; and they are confirmed by decision.

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<sup>1</sup> Vol. i. p. 283.

<sup>2</sup> 4 June 1742. Elchies, “Fraud,” No. 11.

In the case of *Paul v. M'Leod*<sup>1</sup> an entail not completed by infestment was sustained against adjudging creditors, where the bankrupt was proved to be in the situation of a trustee, although he had purchased the lands in fee simple, and in his own name, under a decree of sale in favour of himself, his heirs and assignees. Here, therefore, he was only under a personal obligation to execute the entail; and although it was executed, it was never completed by infestment; and, consequently, could not have been effectual against creditors, except upon the ground that the obligation of trust was pleadable against them. The Court, however, held that it was so pleadable; and "that he was to be considered as a trustee in making the purchase; and, therefore, that the entail was effectual against his onerous creditors."

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

The bond of corroboration does not fall either in principle or on authority under the act 1696, c. 5. The statute, after setting forth what shall be held to amount to evidence of bankruptcy, "declares all and whatsoever voluntary dispositions, assignments, or other deeds, which shall be found to be made and granted, directly or indirectly, by the foresaid dyvor or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days of before, in favours of his creditors, either for his satisfaction or further security, in preference to other creditors, to be void and null."

Both the word and the spirit of the enactment manifestly apply to a preference given to one who previously had no right to it. It is for this reason that the statute strikes only against voluntary preferences, as opposed to those which the debtor had no right to withhold, as

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<sup>1</sup> 20 May 1828. 6 S. & D. 826.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

being part of the original agreement; and hence the opinion seems to be well founded, that even a delay to get the security ought not in such a case to bring it under the act. But it is an abuse, both of the words and the spirit of the statute, to cut down a security, in regard to which the personal obligation of the bankrupt was not trusted to for a single moment, and while the creditor, instead of being negligent, was only deceived. In such a case the Court has never hesitated in supporting the security; and, accordingly, it is justly observed by Mr. Bell, treating of this very case of delay in completing a security which was part of the original contract:—"In the first place, it seems to have been  
" held, that, wherever the bankrupt interfered only to  
" do that which both parties understood had been  
" done at first, and upon the faith of which under-  
" standing alone the money was advanced, the act  
" was not objectionable, nor such as could entitle  
" creditors to separate the security from the advance."  
And he refers to the case of *More against Allan*, 23d January 1800, the particulars of which, as set forth in the note, on the authority of the express terms of the judgment, fully support his view of the matter, as that which was unanimously adopted by the Court.

" But (he observes) another set of cases has created  
" more difficulty, where the parties were sensible that  
" the security was not at first completed, the advance  
" being made on the faith of the deed being afterwards  
" granted. In such a case it scarcely can be said that  
" the lender of the money is more than a personal  
" creditor merely." It is in this class of cases alone that there is any discrepancy in the decisions of the Court; and even here, the latter authorities are in



favour of the opinion, that it is no preference, under the statute, to give a creditor that for which he stipulated as a condition of the loan, because such a creditor is entitled to have his contract fulfilled, and is not in the same situation with the general creditors.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

Referring to the decisions, it does not appear that even in the less favourable case of the failure to complete the security by reason of a delay, in some measure imputable to the creditor himself, there is the least countenance for the assumption, that the bankrupt cannot himself do any thing to aid the creditor, with that view, within the sixty days ; nor does it appear that in any of the cases the mere length of the delay was considered of any farther importance than as a circumstance of evidence against the reality of the original transaction. In the case of *Mansfield and Co. or Nesbitt v. Cairns*, in 1771<sup>1</sup>, the security was both granted and completed within the sixty days. The same was the case in *Houston and Co. v. Stewarts*, in 1772.<sup>2</sup> In the discussions on the bench, as reported by Lord Hailes, all the judges regarded the true criterion to be the original understanding, on which the money was advanced. In *Robertson Barclay and others v. Spottiswood*<sup>3</sup>, in 1783, the bankrupt actually did not give the security till three weeks after notour bankruptcy, or after the lapse of the whole of the sixty days ; and although great difference of opinion began now to prevail in regard to the whole of this class of questions, it does not appear, that any distinction was rested upon the mere fact, that the bankrupt's interference took place within the sixty

<sup>1</sup> Brown's Supplement, vol. v. p. 386.

<sup>2</sup> Ibid. vol. i. p. 403.

<sup>3</sup> 19 Nov. 1783. Mor. 1177.

INGLIS  
and others  
v.  
MANSFIELD.

10th Apr. 1835.

days, or even upon the length of the delay, unless as creating doubt regarding the fact.

In the subsequent case of *Brough v. Spankie and Jollie*, the security and infeftment were granted and completed on the same day, and both within the sixty days. But as at this time the Court held that the decision in the case of *Houston and Co.* was erroneous, and that a creditor, who relies for any period of time whatever upon the personal obligation to get a security, cannot found upon that security, if even its completion by infeftment is delayed till within the sixty days, it is immaterial to examine the argument more closely, it being now fixed by repeated decisions that the objection cannot be carried so far. Only it may be observed, that the evidence of the original contract in this case appears, from the report, to have been assailed on a very serious ground, namely, that it rested entirely upon a holograph writing of the bankrupt, and “that a holograph writing cannot prove its date in a question with third parties, and that to pay any regard to it in the present case would prove the source of endless fraud and collusion.”

In the next case of *Maclean v. Primrose*<sup>1</sup>, the only point which came before the Court was, whether the debtor, who had come under an obligation to grant an heritable conveyance in return for an advance of money, could be compelled by law to grant the security, notwithstanding his having already become bankrupt? The sheriff found that this was no defence. The late Lord Meadowbank altered the sheriff’s judgment, expressing a strong opinion against the authority of the cases sus-

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<sup>1</sup> 16 Nov. 1799. Bell, vol. ii., note, p. 225.

taining such transactions ; but the Court altered his lordship's interlocutor, and ordained the bankrupt to execute the conveyance.

INGLIS  
and others  
v.  
MANSFIELD.

10th Apr. 1835.

In the case of the Bank of Scotland v. Stewart and Ross<sup>1</sup>, no argument rested upon the date of the conveyance, as contradistinguished from the date of the infestment ; on the contrary, the creditor who objected to the security, instead of taking up the distinction pointed out in the opinion of the majority of the Court in this case, insisted that the date of the security must be held to be that of the infestment. Ever since this decision the Court has followed its authority ; and, accordingly, Mr. Bell<sup>2</sup> has observed it to be the fair result of all the later decisions, “ that wherever there is stipulated a specific security over a particular subject, in consideration and on the faith of which an advance of money or transfer of goods is made, the completion of that security, although after an interval of time, and after the term of constructive bankruptcy has begun, is not within the intent and meaning of the act.” This has been fully confirmed by the cases of Cormack v. Gardner's Trustees<sup>3</sup>, and the case of Bontine<sup>4</sup>, which was affirmed by this house, and as observed by the minority of the Court, “ there never was any question of law more fully or deliberately settled than this is.”

The majority of their lordships, indeed, have observed on the case of Cormack, that although there was an interval between the loan and the granting of the security, that interval had elapsed previous to the period of constructive bankruptcy, and “ the debtor, while yet

<sup>1</sup> 7 Feb. 1811.    <sup>2</sup> Vol. ii. p. 226.    <sup>3</sup> 8 July 1829. 7 S. & D., 868.

<sup>4</sup> 2 Feb. 1830. 8 S., D., & B., 425 ; 1 Wilson & Courtenay, p. 79, 6 July 1832.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ sui juris, and before his hands were tied up by the  
“ statute, had done all that was incumbent upon him,  
“ or that he could do, towards the completion of the  
“ security.” But this observation, in regard to the  
bankrupt’s hands being tied up by the statute, is the  
very point de quo quæritur ; and it is incorrect, in  
point of fact, that in the case of Cormack the bankrupt  
had done all that he could before the sixty days, for he  
actually had not delivered the deed till after he was  
notour bankrupt, and even till after sequestration.

Referring again to the case of Bontine, it is admitted  
that the security not only followed at a considerable  
interval, but that it was actually granted within the  
sixty days ; but it is observed that this fact, or rather  
the distinction founded upon it, “ was not brought  
“ under the notice of the Court.” This observation is  
not well founded, for it has been justly remarked in  
the opinions of the minority, that it is expressly noticed  
in the deliberations on the bench, and even in the  
interlocutor of the Lord Ordinary.

It has farther been remarked, that there may have  
been a misapprehension in affirming the judgment in  
regard to the meaning of the term “ voluntary ” in the  
statute, which on various authorities, it is said, compre-  
hends not only deeds granted ex proprio motu, but  
deeds which the debtor was previously under an obliga-  
tion to grant. The appellants doubt whether there be  
any authority sufficient to make out this latter propo-  
sition. If the word voluntary does comprehend obli-  
gations forming part of the original contract, it has no  
intelligible meaning, and no security would be safe from  
the operation of the act 1696. Personal creditors who  
have done no diligence are protected by the act 1696, as

well as creditors who may have done diligence, and the only question under the statute is, whether the conveyance was made with the view of creating a preference? Hence it appears that the word voluntary can have no other meaning than that assumed in the decision of the case of *Bontine*; it is used in contradistinction to cases, where the debtor, instead of giving a preference to which he was not bound, is only fulfilling a special obligation, to which the law would compel him. This is accordingly the view taken by the best authorities<sup>1</sup>, confirmed by most of the decisions, and expressly adopted in the case of *Bontine*; and it is quite a mistake to assume, as seems to be done in the opinion referred to, that this, if an error, originated in the House of Lords, for it is the express ground of the opinions of the judges in the Court below, as appears from both the reports of that case.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

Neither is the bond struck at by the statute 54 Geo. III. c. 137. One great object of the law of sequestration was to combine in that process the whole equalizing diligences, which were previously competent for putting creditors *pari passu*, where no legal preferences had already been obtained, and to prevent the acquisition of new preferences within the period of constructive bankruptcy. For this purpose the first deliverance on the petition for sequestration has combined in it the effect of all the prohibitory diligence which it was previously competent to use. It operates as an inhibition, and it therefore necessarily prevents the bankrupt from granting any deed, which, previous to the existence of the statute, he could not have granted effectually after inhibition had been used against him.

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<sup>1</sup> Bell, vol. ii. p. 202, and authorities there cited.

INGLIS  
and others  
v.  
MANSFIELD.  
——  
10th Apr. 1835.

But the statute nowhere declares that it shall be incompetent for the bankrupt to grant any deed which it would previously have been lawful and proper for him to grant, although inhibition, and every other sort of diligence, had been used against him short of a completed adjudication. The next question is, whether any of the enactments of the statute do by their own force, and without any further proceedings, so divest the bankrupt of his heritable estate, and so vest the trustee, as to render it feudally incompetent for the bankrupt to execute a deed, which was still competent to him, and which, indeed, it was his duty to grant, notwithstanding his bankruptcy, actual or constructive? The defenders submit that there is not.

There is a marked distinction in the statute betwixt the real and the personal estate. With regard to the personal estate, it is declared that the adjudication in favour of the trustee “shall operate as a complete  
“ attachment and transfer of the moveable or personal  
“ estate, for behoof of all the creditors at the date of  
“ the first deliverance aforesaid, without the necessity  
“ of intimation.” But with regard to the heritable estate, there is no such divestiture of the bankrupt by the act of sequestration or investiture of the trustee. It is necessary, and it is carefully provided for in the statute, that the trustee should, in order to divest the bankrupt, make up a regular and complete title according to the forms of the law of Scotland. By the 29th section, it is provided, “That the Court shall, when  
“ the trustee is confirmed, ordain the bankrupt to  
“ execute and deliver, within a reasonable time to be  
“ specified in the interlocutor, a disposition or other  
“ proper deed or deeds of conveyance or assignment,

“ making over to the said trustee or trustees in their  
 “ order his whole estate and effects, heritable and  
 “ moveable, real and personal, wherever situated, and  
 “ which shall specially describe and convey the pre-  
 “ mises, so far as they are known, or so far as the  
 “ trustee shall think it necessary, and be in such form  
 “ and style as may effectually vest the right in him,  
 “ with full powers of recovery and sale for behoof of  
 “ the creditors.”

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

By rendering it imperative upon the bankrupt to grant a formal conveyance, the statute clearly contemplated that without such conveyance, or something equivalent, there should be no divestiture. Accordingly, the conveyance is to be “ in such form and style as may effectually vest the right in the trustee.” It is here not merely implied, but expressly declared, that the trustee cannot be vested, nor, of course, the bankrupt divested, by the mere operation of the statute.

But it might happen that a conveyance could not be got from the bankrupt, and it was necessary to provide for that case. The statute therefore proceeds to enact, that whether such deeds be executed by the bankrupt or not, decree of adjudication shall be pronounced, “ and  
 “ the Court shall, in the act or order above mentioned,  
 “ declare every right, title, or interest which was for-  
 “ merly in the bankrupt, to be now in the trustee, for  
 “ the purposes aforesaid ; and particularly shall adjudge,  
 “ decern, and declare the whole lands, and other heri-  
 “ table estate belonging to the bankrupt, within the  
 “ jurisdiction of the Court, and which, as far as known  
 “ shall be specially enumerated and described, to pertain  
 “ and belong to the trustee or trustees in succession,  
 “ absolutely and irredeemably, to the end that the same

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

“ might be sold, levied, and recovered, and converted  
“ into money for the payment of the creditors ; which  
“ adjudication being in the nature of an adjudication in  
“ implement as well as for payment or security of debts,  
“ shall be subject to no legal reversion.” Hitherto the  
statute has provided merely for the conveyance from  
the bankrupt of the heritable estate vested in him, which  
may be either by his own deed or by special adjudica-  
tion. But that does not complete the title of the  
trustee ; the feudal right still remains with the bankrupt,  
and, in order to divest him, it is necessary that the feu-  
dal estate should be vested in the trustee. Accordingly,  
the next section of the statute has this enactment,  
“ That upon the said disposition or decree of adjudica-  
“ tion, the feudal titles requisite by the law of Scotland  
“ shall and may be made up either in the person of the  
“ trustee or in the person of the purchaser from him,  
“ in virtue of such trustee’s conveyance, agreeably to  
“ the forms of the law of Scotland.” To complete his  
title, therefore, it is imperative upon the trustee to adopt  
the forms of investiture in feudal subjects requisite by  
the law of Scotland ; till he does so, the feudal estate  
remains with the bankrupt. The statute goes on to  
render it imperative upon the superior to enter the  
trustee,—to declare that, in the case of a succeeding  
trustee, he shall be vested either by disposition from the  
former trustee, or by adjudication ; to declare, that if  
the trustee shall afterwards discover any other estate  
belonging to the bankrupt, he shall apply to the Court  
of Session for an adjudication of that estate : “ And in  
“ case the bankrupt’s own title to any part of the estate,  
“ heritable or moveable, real or personal, which be-  
“ longed to him at that period, or to which he had then



“ succeeded as apparent heir, nearest in kin, or other-  
 “ wise, to any predecessor, have not been so completed  
 “ as to vest the right properly in him, the trustee shall  
 “ take the most safe and eligible method of completing  
 “ the bankrupt’s title, in such way and manner as the  
 “ law requires, which title shall accresce to that already  
 “ acquired by the trustee, in the same way as if it had  
 “ been completed prior to the disposition by the bank-  
 “ rupt, or adjudication against him.”

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

The whole of these enactments demonstrate most clearly, that neither the sequestration, nor the general adjudication, nor the special adjudication are of any effect in divesting the bankrupt of the feudal right, and vesting the trustee. The bankrupt is divested only when the trustee has, by one or other of the modes pointed out by the statute, completed his title by infestment.

But in the present case the respondent was not infest till after the appellants had been feudally vested.

*Respondent.*—1. In arguing that creditors are affected by the fraud of the bankrupt, the defenders confound two cases which are in themselves essentially distinct. A bankrupt may, by fraudulent devices of various kinds, raise money, but unless the particular sums of money so raised can be identified (which, in the case of money, can very rarely happen,) the persons defrauded stand in the same situation with other personal creditors: or the bankrupt may acquire property by fraud, either land or moveables; and if that property be extant, as it is easily capable of identification, the person defrauded has an undoubted claim for restitution.

Supposing it to be true that Mr. Stuart did deceive

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

the defenders, by making them believe that, under the name of Hillside, he was truly giving them security over various other lands not contained in the bond, and that, by this fraud, he contrived, in the year 1823, to raise a considerable sum of money, it cannot be maintainable that, in consequence of this fraud, Mr. Stuart's title to those lands, otherwise unexceptionable, is so tainted that his creditors cannot claim the property of them without subjecting themselves in reparation of that fraud.

It is quite clear that, if this be a case of fraud at all, it belongs to that class in which the bankrupt has contrived to raise money by fraudulent devices, and in which the creditors can in no degree be responsible, unless it can be shown that they are deriving benefit from the money so procured by the bankrupt.

This distinction is clearly marked by Lord Kilkerran in the case of Ireland. He says,—“ If the original purchase was fraudulent, as made when Cormack was in the knowledge of Ireland's prior right, the bond taken to be the foundation to effectuate that purchase was no less so; and, according to the above principle, that fraud must affect his creditors adjudgers:” and Mr. Bell<sup>1</sup> observes, that “ while property obtained by fraud is extant in the hands of the bankrupt, the creditors who take that property, or who resist the claim for restitution, are striving to gain by the proprietor's loss; they participate in the fraud of their debtor.”

It is only in this view that the doctrine of *tantum et tale* applies. The extent of this rule, as finally settled by the decisions, seems to be this, that in the case of

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<sup>1</sup> 1 Bell, 277.

real right, i. e. rights to which the debtor has completed a feudal title, any qualifications not appearing *ex facie* of those titles, but depending upon relative personal obligations, are ineffectual even against creditors adjudgers.<sup>1</sup> Farther, that in the case of personal rights to land, or *jura incorporalia*, where the title of the debtor is qualified by conditions inherent in the constitution of the right, a creditor adjudger can take the right only subject to those conditions, even although such conditions would be ineffectual against an onerous purchaser.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

This distinction was sufficiently explained by the decision in the case of *Gordon v. Cheyne*. It was there determined, that certain shares of a trading company, which had stood for a course of years in the name of the bankrupt, but which *ab initio* had been held by him only in trust, did not belong to the general body of his creditors, but to the individual for whose behoof the trust was created. This decision did not pass unanimously, but it went no farther than this, that creditors adjudgers are liable to be affected by conditions or qualifications inherent in the constitution of their author's right, while that right remains personal.

But the case is very different where an individual has himself acquired right by an unqualified title, either to land or a *jus incorporale*, and, in the enjoyment of that unqualified right, has come under an obligation, express or implied, to convey that right to another. The creditor in such an obligation, if he have failed to demand implement from the bankrupt himself previous to his bankruptcy, is not entitled to demand implement from the

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<sup>1</sup> Bell, vol. i. p. 283.

INGLIS  
and others  
v.  
MANSFIELD.

10th Apr. 1835.

creditors of the bankrupt, or to hold that the bankrupt's title is qualified by the extrinsic personal obligation which he had so undertaken.

Accordingly, in the case of *Mitchell v. Ferguson*<sup>1</sup>, the disponee of a house not being infest, the creditors of the disponent adjudged, and were infest; and they were found preferable to a purchaser from the disponee.

It is true that in a subsequent case, *Smith v. Taylor*<sup>2</sup>, some doubt was thrown upon the authority of the decision of the case of *Mitchell*, and the Court seemed to sanction the doctrine, that the general body of creditors could take the property of their debtor only *tantum et tale* as it stood in his person, and so must fulfil the obligation, even although only a personal obligation, which their debtor had incurred in relation to that subject. But, as Mr. Bell observes, "the erroneous opinion, however, which this judgment tended to sanction, did not long prevail;" and he refers, in support of this observation, to the case of *Buchan v. Farquharson*, 24th May 1797; and this is confirmed by the opinion of the judges in the case of *Russell v. Ross's Creditors*<sup>3</sup>, and by the still more recent case of *Wylie v. Duncan*.<sup>4</sup>

On the above principles it is clear that no distinction applies to the property which was not feudalized in the person of Mr. Stuart.

2. The bond obtained by the appellants is struck at both by the act 1696, c. 5., and the 54 Geo. III. c. 137.

In regard to the act 1696, the leading distinction between the present case and any of those which have occurred, in which the statute has been found not to

<sup>1</sup> 13 July 1781. Mor. 10,296. Hailes, 880.

<sup>2</sup> 1 Bell, 288.

<sup>3</sup> 31 Jan. 1792. Bell's Cases, p. 177.

<sup>4</sup> 3 Dec. 1803. Mor. 10,299.

apply, is, that no money was paid for the security in question, which was an original deed granted by the bankrupt. There is, therefore, no similarity between it and an heritable bond granted before the sixty days, on which sasine is taken by the creditor during the period of retrospective bankruptcy. There is another manifest distinction between such a case and the present. In the former nothing is done by the bankrupt; the sasine is taken by the creditor, without any act or deed by the bankrupt, and merely in order to complete the right which was obtained before bankruptcy. If therefore the present case is to be considered as involving the principles of a novum debitum, it is most analogous to those cases where money was advanced on the faith of heritable security, which was not granted previously to the bankruptcy of the debtor. It was at one time held to be law, that where the security, though stipulated for before, was not granted till after the sixty days, it was null under the statute; and upon this ground, that, till the security was granted, the creditor must have relied on the personal security of the debtor, and was therefore in no different situation from his other personal creditors; and upon this principle the cases of *Brough v. Duncan* and *Jollie and Maclean v. Primrose* were decided.

It is true that, in the case of *Mansfield, Hunter, and Co.*<sup>1</sup>, it was decided, that where money was advanced in consequence of an agreement to grant an heritable security, such security, even although granted within sixty days of the debtor's bankruptcy, was not reducible in terms of the statute. A decision to the same effect was given in the case of *Houston and Co.*<sup>2</sup>; but in the

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

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<sup>1</sup> 15 February 1751.

<sup>2</sup> 20 February 1772.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

subsequent case of *Spottiswood v. Robertson Barclay*<sup>1</sup>, doubts were expressed of the soundness of those two previous decisions. Judgment had been pronounced, sustaining an heritable bond of annuity granted by a husband within sixty days of his bankruptcy, in respect of a prior obligation to grant it, contained in his marriage articles; but, upon a reclaiming petition, the judges were much divided in opinion, and a hearing in presence was appointed for the purpose of reviewing and settling the question. With reference to that case, Mr. Bell observes:—"It never came again to trial, having  
" been compromised. But, if I can judge from the in-  
" cidental opinions which I have heard of two judges,  
" (in particular Lord Justice-Clerk Macqueen, who sat  
" upon the bench at that time, and Sir Ilay Campbell,  
" who was counsel in the cause,) there is much reason  
" to believe that the ultimate decision would have been  
" different from the first."

But in ten years thereafter the question was again raised and decided in the case of *Brough v. Duncan*, and *Brough v. Spankie*.<sup>2</sup> In both of these cases heritable security had been stipulated for from the first; but in neither had it been actually granted till within sixty days of bankruptcy. In both cases the Court held, that the lender of the money was a mere personal creditor, and that the securities were reducible.

In the subsequent case of *Maclean v. Primrose* the late Lord Meadowbank, in a note<sup>3</sup>, condemned the decision in the case of *Houston and Co.* "as clearly contrary to  
" principle, since an obligation to grant a preference  
" cannot constitute an actual preference on an heritable

<sup>1</sup> 19 November 1783.

<sup>2</sup> 5 June 1793.

<sup>3</sup> 16 November 1799. 2 Bell, p. 225.

“ subject in a question with other creditors ; and, accordingly, it is one of those decisions which are frequently quoted, and as often disregarded by the Court.”

INGLIS  
and others  
v.  
MANSFIELD.

10th Apr. 1835.

The result then of these authorities seems to be this, that a security granted within the period of constructive bankruptcy, even although in implement of an obligation previously undertaken, is reducible under the statute; and farther, that after bankruptcy, or during the period of constructive bankruptcy, a debtor can do no act, even although in implement of a previous obligation, by which the situation of any one creditor can be improved at the expence of the rest.

The doctrine which was thus established was not in any degree shaken by the decision in the case of the Bank of Scotland v. Stuart. There the question was, with regard to the validity of a security, the sasine upon which had been taken within the period of constructive bankruptcy. Applying the statute strictly, as had been done in some of the earlier cases, the security must have been set aside in consequence of the date of the sasine; but the answer was, that the deed upon which the sasine proceeded had not been granted in satisfaction of a prior debt, but in consequence of an agreement entered into at the time when the money was advanced. That having been established to the satisfaction of the Court, the date of the sasine, which would have been conclusive against a transaction of a different character, was held to be immaterial.

The only case which can be supposed to give countenance to an opposite doctrine is that of Cranstoun and Anderson v. Bontine. But so far as that case is to be considered as a decision of the Court of Session, its authority is completely superseded by the detailed opinion

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

which has been given in the present case, by the judges themselves who pronounced it. Lord Craigie, Lord Balgray, and Lord Gillies, who concurred in the judgment in the case of Bontine, have expressly stated, that the important distinction between it and the cases previously decided, (the conveyance by the bankrupt in the one being previous to the sixtieth day, while in Bontine's it was subsequent,) was not brought under the notice of the Court.

But even assuming that the case does not fall under the act 1696, c. 5, it clearly comes within the statute 54 Geo. 3.

By the act of sequestration, the whole estate and effects of the bankrupt are withdrawn from the possession and control of the bankrupt, and placed under the management of officers subject to the jurisdiction of the Court. Even before the election of a trustee, the creditors are appointed to choose an interim factor, and failing their doing so, the care and custody of the bankrupt's estate and effects devolve upon the sheriff-clerk.

By the 17th section of the statute it is enacted,  
“ That the said factor or sheriff-clerk, chosen as interim  
“ manager, shall be entitled to take possession of the  
“ bankrupt's whole estate and effects, and of the bills,  
“ notes, and whole other vouchers, title deeds, and  
“ instructions of his estate, and also of his books and  
“ papers; and the bankrupt shall, if required by him or  
“ the creditors, grant powers of attorney, or other deeds  
“ which may be deemed necessary or proper, for the  
“ recovery of the estate and effects situated in foreign  
“ parts, under the pain of fraudulent bankruptcy,” &c.

After the election of the trustee, and after his nomination has been reported to the Court, and approved of,



the 29th section declares, that “ the Court shall at the  
 “ same time ordain the bankrupt to execute and deliver,  
 “ within a certain reasonable time, to be specified in the  
 “ interlocutor, a disposition, or other proper deed or  
 “ deeds of conveyance or assignment, making over to  
 “ the said trustee or trustees, in their order, his whole  
 “ estate and effects, heritable and moveable, real and  
 “ personal, wherever situated, and which shall specially  
 “ describe and convey the premises, so far as they are  
 “ known, or so far as the trustees shall think necessary,  
 “ and be in such form and style as may effectually vest  
 “ the right in him, with full powers of recovery and  
 “ sale, for behoof of the creditors ; and if the bankrupt  
 “ shall, without reasonable cause, neglect or refuse to  
 “ obey such order, the Court may punish him by im-  
 “ prisonment ; and in all events, whether such deed or  
 “ deeds be executed or not, it is hereby declared and  
 “ enacted, that the said whole estate and effects of  
 “ whatever kind, and wherever situated, (in so far as  
 “ may be consistent with the laws of other countries,  
 “ when the effects are out of Scotland,) shall be deemed  
 “ and held to be vested in the said trustee or trustees  
 “ in succession, for behoof of the creditors ; and the  
 “ Court shall, in the act or order above mentioned,  
 “ declare every right, title, and interest which was for-  
 “ merly in the bankrupt, to be now in the trustee,  
 “ for the purposes aforesaid ; and particularly shall  
 “ adjudge, discern, and declare the whole lands, and  
 “ other heritable estate, belonging to the bankrupt,  
 “ within the jurisdiction of the Court, and which, as  
 “ far as known, shall be specially enumerated and  
 “ described, to pertain and belong to the trustee or  
 “ trustees, in succession, absolutely and irredeemably,

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
10th Apr. 1835.

“ to the end that the same may be sold, levied, and  
“ recovered, and converted into money, for payment of  
“ the creditors; which adjudication, being in the  
“ nature of an adjudication in implement, as well as  
“ for payment of debts, shall be subject to no legal  
“ reversion.”

By the 22d section of the statute, the deliverance upon the petition for sequestration is directed to be recorded in the general register of inhibitions within fifteen days, “ and the same shall, from the date of the “ deliverance, be held equivalent to an inhibition.” The nature and effects of the diligence of inhibition are well known. It gives to the personal creditor, at whose instance it is used, a right to reduce all conveyances of heritable property made by his debtor subsequent to the publication of the inhibition. Upon that ground alone the subsequent conveyance executed by Mr. Stuart, to the prejudice of the respondent, acting for behoof of the personal creditors, would be reducible.

It may be true that, in order to satisfy the rules of feudal conveyancing, something more is required to make the title of the trustee perfect. But that circumstance is of no importance, when the only question is with regard to the validity of a deed impetrated from the bankrupt, during the dependence of judicial proceedings, anxiously published to the world, and in contempt of an order of Court pronounced in the course of these proceedings.

But above all, and keeping in view that the appellants claim a preference solely in virtue of the supplementary deed executed by Mr. Stuart eight months after his estates were sequestrated, and after the Court had adjudged those same estates to belong to the respondent,

it cannot be denied that at the date of the sequestration the appellants were entitled to no preference at all; their preference was derived from the act of the bankrupt, many months after the date of the sequestration. But by the 38th section of the statute it is enacted,  
 “ that the whole estate and effects, of whatever kind,  
 “ belonging to the bankrupt at the period of the  
 “ sequestration, or the produce thereof, after paying all  
 “ charges, shall be a fund of division among those who  
 “ were his creditors prior to the date of the first  
 “ deliverance aforesaid, and none else, regard being had  
 “ to preferences obtained by securities, or by diligence  
 “ before the said deliverance, and not expressly set  
 “ aside by this act, but to no other claims of pre-  
 “ ference.”

INGLIS  
 and others  
 v.  
 MANSFIELD.  
 —  
 10th Apr. 1835.

LORD BROUGHAM.—My Lords, I shall take time to consider this case, before I advise your Lordships to proceed to judgment. It involves questions of importance in point of law, but I do not feel pressed by any great difficulty as to which way it should be decided. I strongly incline to an affirmance of the judgment of the Court below. I think the case has been a good deal lengthened out by the very learned arguments which have been brought to bear upon it; but it is perhaps clearer than it has been considered. That is no reason, however, why I should without further consideration give my humble advice to your Lordships; or that, following up the opinion towards which I have a strong leaning, I should conclude that I have a better view of the subject than some who have dealt with it below.

I will state shortly the grounds on which I think it must be held that Mr. Stuart had not the power to do

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

that which forms the subject matter of this reduction. My argument proceeds chiefly upon the view of the subject which arises on the bankrupt law, — I mean the act 54th Geo. III. cap. 137. As at present advised, my opinion is, that the 29th section divests the bankrupt, although it does not invest the trustee until his feudal title shall be made up. It would follow, if this is the correct view, that by force of the words of the section itself, declaring the right to be vested heritably, absolutely, and irredeemably in the trustee for the creditors, the bankrupt is prevented from dealing with the property in the intermediate space during which the trustee had not made up his titles; although the trustee would not be entitled to deal with the property, he being incapable of giving a feudal title until his investiture has been accomplished, as provided for under the subsequent section of the statute. Nothing can be more consistent with the principles of statute law, or less consistent with the principles of the common law, than that any fee should remain in pendente, or, as it is sometimes phrased, in nubibus; but that suspension may be well operated by the statute, to the effect of there being, for a certain period of time, no person in esse who can validly deal with the whole right to that property,—there being, however, during that interval, by the force of the statutory provision, possession by the law, with a view to subsequent operations. There are various instances of this in the bankrupt laws, which it is needless now to specify. A considerable difficulty will arise, if we are to determine this case upon the statute 1696. That was the only other argument, and was most largely dwelt upon by the counsel for the appellant, and ably commented upon by the learned judges in the Court

below, who agree with the appellant in the argument raised upon that statute, and the cases decided under it. The difficulty which I feel upon this branch of the case arises (as I have more than once thrown out in the course of argument) from the very imperfect knowledge we have of the way in which some of those cases were looked at. I observe that the case of *Mansfield and Co. v. Cairns*<sup>1</sup> and that of *Houston v. Stewart*<sup>2</sup> are reprobated in other cases. It cannot be doubted that the two cases of *Brough v. Duncan*<sup>3</sup> and *Brough v. Spankie*<sup>4</sup> really are not law, or contended that they are sufficient authority for the purpose of destroying the authority of *Houston v. Stewart*, and, by implication, of *Mansfield v. Cairns*. If it is said that the cases, quoad the cutting down securities granted by Brough to his creditors, in the one by a letter missive, and in the other by heritable bond, are bad law, but are good to the effect of destroying the authority of the two older cases, that appears to me a somewhat arbitrary mode of dealing with authorities. But we have a current of opinions of professional men upon the subject; and, above all, we have what with me is of the highest authority, and of the greatest weight, the very valuable opinion of the late Lord Meadowbank,—one of the best lawyers—one of the most acute men—a man of large general capacity, and of great experience, and with hardly any exception, certainly with very few exceptions, the most diligent and attentive judge one can remember in the practice of the Scotch law; his valuable notes from time to time affixed to cases having been very much the means of introducing

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

<sup>1</sup> 15th Feb. 1771; Mor. No. 6. App. Bankrupt; Hailes, 403.

<sup>2</sup> 20th Feb. 1772; Mor. 1170; 1 Hailes, 468.

<sup>3</sup> 5th June, 1793; Mor. 1160.

<sup>4</sup> 5th June 1793; Mor. 1179.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

that wholesome practice in Scotland. His Lordship, in *Maclean v. Primrose*<sup>1</sup>, gives an opinion of the most unhesitating kind against the authority of *Houston v. Stewart*. He does not merely by implication put down that which has been distinguished from it, *Mansfield v. Cairns*; for I do not think we can discern any special circumstances to distinguish that case from the other. If it shall be found necessary to go into the question which the arguments have raised under the statute 1696, my opinion, as I have already stated, is not made up upon that. There is a circumstance which one cannot easily leave out of view, I mean the great hardship of Mr. Walker's case; and if I should ultimately be of opinion that we ought to affirm this decision, (as is very probable,) there is no doubt that, upon this ground of hardship, it should be without any costs; and it may farther be considered whether we can, consistently with the practice in former cases, affirm the decision of the Court below on the principal matter, without affirming that which saddled him with expences. This case is a most hard one; and not the less hard, in that there is no blame attachable to the party with whom he was dealing; I have no doubt that, in fact, there is no blame imputable to Mr. Stuart. If he had intended to deceive Mr. Walker—*cui bono*? The deed was to benefit nobody; for it was kept and hung over the estate: he did not deal with it. If the bankruptcy had intervened immediately, it might have been said, *non constat* that he did not intend to sell again, and to obtain more money; but, although the pressure of his difficulties was increasing rather than lessening, during five

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<sup>1</sup> 16th Nov. 1799; 2 Bell, 225, note 2.

long years, yet he never took one single step to do any thing inconsistent with the rights which he thought he had conveyed to Mr. Walker. My belief is, that it was an oversight to which the most experienced man of business, and skilful conveyancer as he was, may be liable; and that he would himself have been the first person to retrieve it, if he had been aware of it. This is perfectly reconcileable with the facts of the case, without imputing any blame to him. But Mr. Walker has been the sufferer, all the same as if there had been intentional neglect or omission, and his representatives are therefore much to be pitied. At the same time, the creditors, or the trustee for the creditors, are not bound to give up their rights. It becomes therefore highly desirable that, if possible, those representatives should not be required to pay the expences. What possible reason was there why they should not come into Court—why they should not defend this action? They had got an apparent title, and why should they not defend it? It appears to me rather extraordinary that the learned judges should not have thought of that when they came to consider the giving the costs below; for, according to their view, the question was a very nice one: they divided eight to five; and they considered it by no means a settled question. Some of them considered it as a question of the first impression, a case decided in this House by Lord Wynford leading them to view it in that light. It is not a case by any means for giving expences. The rule with respect to costs in this House, as well as in the Privy Council and the Court of Chancery, is, that you cannot appeal for costs alone; but if you bring an appeal on the merits, and if it is not a colourable appeal, for the purpose merely of introducing the question of costs, the court of review

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

may, in affirming the judgment, consider the question of costs awarded in the Court below. In the present case, no one can think here that bringing this appeal on the merits was colourable merely. I shall, therefore, if I recommend to your Lordships to affirm the judgment, certainly take that matter into consideration. I now move your Lordships that the further proceedings on this case be adjourned.

The case having stood over till this day,

LORD BROUGHAM :—My Lords, the facts of this case lie within a narrow compass, and are wholly undisputed. Mr. Stuart gave Professor Walker, in 1823, a security over a parcel of his real estate of Hillside in the county of Fife, and believed, as did the Professor and his conveyancers, that this security extended over the whole property of ninety-five acres of very valuable land. In this belief 6,000*l.* were advanced, and the lender was infested in 1824. It was afterwards discovered that the title given extended over only five acres ; and Mr. Stuart then gave additional security, conveying the whole, but this was after he had become bankrupt. A sequestration having been awarded in September 1828, and the respondent having been chosen and duly confirmed trustee for the creditors 6th of October of the same year, while the corroborative security was granted in May 1829. Between the respondent's confirmation as trustee and his making up his title as such, Professor Walker was infest upon the second security ; and this action was brought by the trustee to reduce that second security and all that followed upon it. The Court decreed for the reduction ; and I am of opinion that the decree is well founded, and must be affirmed. There are two grounds on which it



rests: First, that the security granted was reducible under the act 1696, as granted within the period when all preferences of the bankrupt are reducible; and, secondly, that whether it is so reducible or not, yet being granted after the adjudication of bankruptcy and the confirmation of the trustee, it was granted à non habente potestatem, and is a nullity as against all men, especially as against the trustee, in whom the estates real and personal of the bankrupt were vested.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

1. With respect to the first point, there is a conflict of authority, and though it becomes unnecessary to decide on which side the balance must be cast, as the second ground is sufficient for our purpose, yet the great importance of the question carries us into this discussion. That infestment within the sixty days may be validly taken upon a conveyance granted prior to that period seems not be denied. It is agreed that a heritable right may be granted before the sixty days, and sasine may validly be taken upon it within that time, although nothing of the prior right can appear on the record: but the security itself having been here granted after the statutory period, and not merely the sasine had, we need not dwell longer upon that admission; and there is certainly no small discrepancy in the authorities upon this point. Previous to the case of *Mansfield v. Cairns*, 1771, the decisions were against the validity of a security so granted; but it was then held, that money having been advanced before the time, on an agreement to grant heritable security for the loan, such security might safely be granted within the sixty days; and the same doctrine was upheld in the subsequent case of *Houston v. Stewart*. As the provisions of the act 1696 strike at preferences, these decisions could only stand upon the

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

ground that there was in such cases no preference. The act expressly names “all dispositions, assignations, and “other deeds granted in favour of his creditors, either “for his satisfaction or further security in preference to “a creditor’s;” and I confess my own inability to discover how the party advancing the money for example, in *Mansfield v. Cairns*, which never had been paid, could be considered as other than a creditor of the bankrupt, merely because he advanced it upon an agreement; and how the heritable security, afterwards granted in performance of such an agreement, could be deemed any thing but a “further security.” However, these two decisions plainly view the parties as standing in a different position, and the transaction as differing from that. Unable to perceive the grounds of the rule there laid down, and thinking those cases wrongly decided, I am not surprised to find them afterwards questioned by the Court. In *Spottiswood v. Robertson Barclay*, Nov. 19, 1788, the question was raised by an heritable security granted in pursuance of an obligation in a marriage settlement, and the security sustained. But Mr. Bell says, (*Bankrupt Law*, ii. 235,) that the Lord Justice-Clerk Braxfield and Lord President Campbell (two of the great authorities in the Scotch law) doubted the soundness of the first decision; when a reclaiming petition was presented and a hearing in presence ordered, which never took place, as the case was compromised; and Mr. Bell adds, that there is reason to believe that the first decision would have been reversed. Now, surely, if a bankrupt is not allowed validly to perform what he has bound himself to do by marriage contract, it is strong to say that he can validly implement any other onerous obligation within the statutory period. It is recorded of

Lord Monboddo, that he said, on the decision in *Mansfield v. Cairns* being pronounced, “there is no use in “studying law.” In the subsequent case of *Maclean v. Primrose*, the late Lord Meadowbank, a very high authority, held *Houston v. Stewart* not to be law; and in one of the cases of *Trustees of Brough v. Duncan*, and *Trustees of Brough v. Spankie*, both decided 5th June 1793, the Court held the same opinion respecting that of *Houston v. Stewart*, regretting that the older one of *Eccles v. Merchiston* prior to 1751 had been departed from; and although they said nothing of the first of these cases, which made the deviation in *Mansfield v. Cairns*, it is plain that this cannot stand, if *Houston v. Stewart* be overruled. In the one of these cases of *Trustees of Brough* (the second) the Court held the statute to apply to securities given after the commencement of the sixty days, in implement of preceding obligations. There had been a letter missive, on the faith of which a bill had been accepted, and agreeing to give the acceptor heritable security over a particular property, as soon as the writings could be made out. The security was not granted till within sixty days of bankruptcy. This was held to be struck at by the act 1696, and it was in this case that the Court pronounced *Houston v. Stewart* to be wrong.

The other case appears to me to have been itself erroneously decided, at least if the decision is held to strike at an infestment taken within the sixty days, on a security granted before, which was the case. It is barely possible to consider that the long time which had been suffered to elapse between the date of the conveyance and the completing of the security by infestment, which was above three years and a half, may have been a sufficient ground for the decision, as evidencing a fraudulent

INGLIS  
and others  
b.  
MANSFIELD.  
——  
10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

and collusive transaction. Certain it is, that this case can stand on no other ground. But with the other case of the Trustees of Brough I have no quarrel at all ; and thus the law would have stood clear, and ultimately consistent with the older and sounder doctrine of Eccles v. Merchiston, which had been temporarily departed from in Mansfield v. Cairns and Houston v. Stewart. But unfortunately there occurred a case in 1811, Bank of Scotland v. Stewart, in which the Court once more resorted to the exploded doctrine of these two ill-decided cases ; and, excepting the fact of the title deeds of the borrower having actually been deposited before the statutory period for the purpose of making out the conveyance, I can find nothing to differ this from the cases of Eccles v. Merchiston and Brough v. Spankie, or to justify a recurrence to the contrary doctrine. Upon the whole, I am of opinion that the cases of Eccles v. Merchiston and Brough v. Spankie are rightly decided ; that one of the Brough cases (Brough v. Duncan) is not to be supported ; that Mansfield v. Cairns and Houston v. Stewart are not to be considered as law ; and that though a party taking infestment after the statutory period has begun, on a security fully given before, is safe, yet that a bankrupt giving security after the period, in virtue of an obligation previously given for a valuable consideration, whether of marriage, or loan, or purchase, is within the act 1696.

2. But the second point in the cause appears to me encumbered with no doubt ; and it is, in my judgment, quite decisive in favour of the decree under appeal. Mr. Stuart was, at the time in question, under the operation of the bankrupt act — the act expressly framed for making the payment of debts more equal, and for

distributing all an insolvent person's estate, of whatever kind, equally among all his creditors. Now, although the retrospective operation given to the bankruptcy by the act 1696 may not extend to prevent a person not yet bankrupt from doing certain acts which he had previously actually bound himself to do, and which acts are not giving preferences to old creditors; and though certainly that retrospect is to be construed strictly, and not permitted to extend beyond what is fully expressed in the statutory words of nullity, yet it by no means follows that he is, after having been adjudged a bankrupt, empowered to do any act whatever, either original or supplementary; either acts which he lay under no previous obligation to do or acts to do which he had already bound himself. While he continues to have an independent and legal existence, he may be allowed to perform his obligations, although, within the period during which he is by the act disabled to give new securities he may be enabled validly, to do any act which falls not within the statutory description of preference to one creditor over the rest. But it by no means follows that, after his legal existence as owner of any property has altogether ceased, he shall have any power whatever, either to grant new securities for old debts, or to give one creditor any other preference over the rest, or to do any act affecting his property, even though that act should be of a kind which confessedly does not fall within the retrospective operation of the statute 1696; and indeed, without regard to the specific provisions either of that or of the later bankrupt acts, we may say generally that a more strange anomaly could not well be imagined, nor any position more entirely at variance with the whole policy

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

of the bankrupt law, and indeed more repugnant to the notion of an adjudged bankrupt, than that he should retain the power of conveying his property after he had been so adjudged by sentence of the Court,—not *ex parte* as in England, where the adjudication takes place without his knowledge, but in *foro contentioso*, in a suit to which he was cited as a party. To support so singular a doctrine would require the plainest statutory enactments; and these are here all signally the other way. First, we may observe upon the nature of the process of sequestration itself. The action of declarator of bankruptcy given by the act 1696, and in lieu of which the sequestration given by 12 Geo. III. c. 72., extended to real estates by 23 Geo. III., was substituted, affected all the property of the bankrupt in the same manner in which the proceedings under the late acts do; for by that act 1696, upon a person being adjudged bankrupt in the declarator, his acts and deeds after his bankruptcy, as well as within sixty days before it, are declared void, if done in preference of one creditor over another. This, however, bringing the question back to that which was discussed under the first head, I need dwell no longer upon it, as in dealing with the present point I rely on the provisions of the later statutes. I may only observe, that the earlier statutes, 12 and 23 Geo. III., are not so express in their words, vesting the trustees, and consequently divesting the bankrupt, as the more recent ones; but they assume the nature and force of sequestration to be, as no doubt it is in itself, a judicial divestment, which makes the bankrupt's power of dealing with his property cease, unless in so far as he is to obey the orders of the Court, in making the conveyance to the

trustees. In particular, all these acts (old and new) contain a provision declaring all the bankrupt's property, real and personal, at the date of the sequestration, to be a fund for distribution among his creditors. This forms the 38th section of the present bankrupt act, and it is the 22d section of the 23d Geo. III. cap. 18., — the first act that applied sequestration to heritable estates: in truth the process of sequestration can mean nothing else. Let us now see what additions are made to these things by the law at present in force, to regulate the whole proceedings in bankruptcy — 54 Geo. III. cap. 137. The trustee in this case had been confirmed as such by a decree of the Court, and we are to see how the act treats the rights of a person so acknowledged, and how, by necessary consequence, it treats the bankrupt himself. The 29th section requires the Court to ordain (that is, to command by a judgment or order,) the bankrupt to make over, within a time to be specified, by disposition or other proper deed of conveyance, to the trustee, his whole estate, real and personal, specially describing the parcels in such conveyances; and the instrument is required to be in such form and style as may effectually vest the right in the trustee. Now, suppose it had stopped here, and the Court had made the order which it has made,—as much reliance is placed by the appellant, at least in the first branch of the argument, upon the analogies of our English law touching equitable estates, let us ask how our courts would consider any act done by a bankrupt, or by any other person, after an order had been made upon him to convey his estate to A. B. for whatever purpose? Why, it is clear that he never could validly affect that estate by any act whatever, except by the conveyance which he was

INGLIS  
and others  
v.  
MANSFIELD.

10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

directed to make. It would not follow that A. B. could, before the conveyance, deal with it; but, at all events, the bankrupt or other party ordered to convey never could deal with it effectually in any manner of way. But the statute proceeds to declare and enact, that in all circumstances, and whether such deed be executed or not, “ the said whole estate and effects shall be deemed “ and held to be vested in the said trustee for the creditors :” this is expressly declared and enacted, “ it is “ hereby declared and enacted.” Is not this enough to divest the bankrupt? Is it not a statutory conveyance at all events out of him? Is there a better title to the substance of any right, whatever may be wanting to the forms of it, than an act of Parliament, providing expressly that such right is by force of the act in one party? But can a man’s property be taken out of him more effectually than by a law of the country, providing that it is hereby vested in another? At any rate, can that man’s hands be more effectually tied up than by such a statutory declaration and enactment? What stronger case would it have been, had the act expressly said (which would have been really superfluous) that the bankrupt should thereafter cease to do any act relating to his property so divested. But the act goes on, and in the plainest terms assumes his being divested by the statute, and by the order which the Court is required to make; for it directs the Court to declare, decree, and adjudge, in its order, that the whole estate, right, title, and interest, “ which were formerly in the bankrupt, shall now “ pertain and belong, absolutely and irredeemably, to the “ trustee.” This adjudication has in the present case been made, and, in my clear opinion, divests the bankrupt : although, until the trustee makes up his title, he cannot



convey by sale or encumbrance upon plain feudal principles, still it is enough to take the property out of the bankrupt. But I read the words of the act now for the further and important purpose of showing that the legislature so regarded the order of adjudication; for the act expressly speaks of “all the right, title, and interest formerly in the bankrupt.” Words cannot more clearly express that, after the adjudication, the estate is not in the bankrupt at all, and that all his power over it in any way, and to all intents and purposes, has ceased from and after that period. The authority of *Mitchel v. Syme* has been cited in further support of the decree, and it bears upon this branch of the argument. I think it is of use in that respect, for it held an infestment of a real estate, subsequent to a disposition on which no infestment had been taken, sufficient to cut down that disposition, and defeat a sasine subsequent. But I do not think the authority of that decision necessary to support the present. As for the argument raised upon the analogy of inhibition, and on section 22, which gives the recorded petition the force of a recorded inhibition, nothing can result from that. The object of the provision is to make the mere intimation of the petition of sequestration and the first deliverance upon it, if registered, have a certain effect, and it gives that proceeding only the effect of inhibition, — deeming this a sufficient protection against acts to be done while the petition is pending, and before adjudication. Nothing can be more rational than the supposition that the act intended to give the inchoate procedure, — the mere presenting and intimating a petition to sequester, — a less extensive nullifying effect than the final adju-

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

dication itself. Nothing can be more consistent than that the sequestration itself, finally granted, should divest the bankrupt to all intents and purposes; while the commencement of a proceeding to obtain that sequestration should only have the more limited effect of a recorded inhibition. Much of the argument in this case seems to have been rested on the analogy of our equitable estates in England; but the Scotch law holds no resemblance now with the law of England in this particular, though both systems had one common original. Our equitable titles are peculiar to our jurisprudence. An agreement to convey an estate for a valuable consideration executed is with us, to all substantial purposes, a conveyance which vests the property in the purchaser, although, to obtain his full rights, he must resort to one court, and demean himself as a suitor according to one set of rules, and not another. Whatever is covenanted to be done is held in equity as done, so that a title by mere agreement is quite as paramount to any subsequent incumbrance, or other puisné title, as a legal conveyance. This is not the law of Scotland. Upon feudal principles, the party who first perfects his title by sasine (and since the act 1617, by registration also of his sasine,) is preferred to him, who, at a prior time, may have paid his money on an agreement or obligation. Land is only affected by the Scotch and the feudal law in a certain way. Any other mode of conveying it, or burthening it, is as inept and as inefficient as a sale or mortgage by parole would be with us. If, here, a man gave his money on a parole conveyance or mortgage, he would of course be cut out by one who the next month got a mortgage or conveyance, or even an equitable title, by a written

agreement, from the same proprietor to the same lands. This might be a hardship, and it is exactly the same kind of hardship which may happen in Scotland, and which has happened here, with this only difference, that in Scotland writing may be as inefficient to affect the land as parole is here. This consideration, too, is an answer to the argument, that the trustee takes the estate of the bankrupt *tantum et tale*. He does so; and the estate was not affected in the bankrupt's hands by the personal obligations, which were sufficiently valid and binding against the bankrupt. Between the bankrupt and the trustee there can be no privity such as to affect the latter with any personal obligation incurred by the former; and the land not being affected by such obligations, the trustee taking it *tantum et tale* takes it discharged of any real burthen. As to the English law, it may be further observed, that even we allow some further nicety, oftentimes working great injustice to creditors. He who, posterior tempore, obtains a legal title to an estate covered with real securities, will, by obtaining a prior equity, defeat one who lent his money on an equitable title only between the date of the two titles that now unite in the same person; so that one who has lent his money this year may be defeated, or, as it is very expressively termed, squeezed out by one who has only advanced money on the same estate a year after. The rigorous administration of the feudal principles in Scotland can work no greater hardship than this, and the consideration of such topics is only important in such a case as affecting the question of costs; I am of opinion, that none should be given either here or below; and with the exception, therefore, of the

INGLIS  
and others  
v.  
MANSFIELD.  
—  
10th Apr. 1835.

INGLIS  
and others  
v.  
MANSFIELD.

10th Apr. 1835.

order of the Court of Session, as to expences, I now move your lordships to affirm the interlocutors complained of.

The House of Lords ordered and adjudged, “ That the  
“ interlocutor complained of in the appeal, (so far as the  
“ same finds the defender liable in expences, and remits  
“ the account thereof, when lodged, to the auditor to tax  
“ and report,) be and the same is hereby reversed ; and  
“ it is further ordered, that the said interlocutor in all  
“ other respects be, and the same is hereby affirmed.

A. L<sup>d</sup> CRAE—MONCRIEFF and WEBSTER,—  
Solicitors.

[13th April 1835.]

The Right Honourable Lord MACDONALD, Appellant.

*Dr. Lushington — Keay.*

The Honourable ARCHIBALD MACDONALD, Respondent.

*Lord Advocate (Murray) — Tinney.*

*Heir and Executor — Relief — Clause.* A party possessed of two estates, the one of which he held in fee simple, and the other under an entail, which allowed reasonable provisions for younger children, having bound himself, and his heirs succeeding to these two estates, to pay certain provisions to his younger children; and the first heir who succeeded to these estates having possessed them without paying the provisions, Held (affirming the judgment of the Court of Session) that the second heir succeeding to these estates was liable, without relief against the executors of the first heir.

ALEXANDER the first Lord Macdonald had a daughter, Lady Sinclair, and five sons, viz. Alexander Wentworth, Godfrey, James William, Archibald, and Dudley. His lordship was fee-simple proprietor of the estate of Strath, and he held the estate of Macdonald under a deed of entail, which authorized the heirs in possession “to provide their younger children, besides the heir, “with competent provisions, agreeably to the circumstances of the estate.”

By a bond of provision, dated 24th September 1794, Alexander Lord Macdonald “bound and obliged him-

LORD  
MACDONALD  
v.  
MACDONALD.

13th Apr. 1835.

“ self, and his heirs succeeding to him in his lands and  
 “ estates of Macdonald, Strath, and others, lying in the  
 “ islands of North Uist and Skye or otherwise in the  
 “ county of Inverness, to content and pay to the respon-  
 “ dent, the Honourable Archibald Macdonald, the sum  
 “ of 7,500*l.* sterling, and that at the first term of  
 “ Whitsunday or Martinmas next and immediately  
 “ following the granter’s death, with a fifth part more  
 “ of penalty in case of failure, and the legal interest of  
 “ the said principal sum from the said term of payment,  
 “ and thereafter so long as the same should remain  
 “ unpaid.” This bond of provision sets forth, that the  
 granter, Alexander Lord Macdonald, had, by his con-  
 tract of marriage, dated 28th March 1768, bound him-  
 self, and his heirs, executors, and successors, to make  
 payment to the younger sons and daughters of the  
 marriage, in case of an heir male thereof, of the sum of  
 5,000*l.*, at the next term of Whitsunday or Martinmas  
 after their attaining to the age of twenty-one years, or  
 after the granter’s death, whichever of these events  
 should first happen, with interest thereafter till paid.  
 The bond of provision then sets forth, that in con-  
 sequence of the rental of the estates of Macdonald and  
 Strath having much increased since the date of the said  
 marriage contract, and being likely still more to in-  
 crease, his lordship, therefore, over and above the other  
 provisions settled on his younger sons out of his separate  
 estate and effects, by a deed, of the same date with the  
 bond of provision above mentioned, bound and obliged  
 himself, and his heirs succeeding to him in the estates of  
 Macdonald and Strath, to make payment to the pursuer  
 of the sum of 7,500*l.* above mentioned, and to each of  
 his younger sons of the like sum of 7,500*l.*

Alexander Lord Macdonald, the granter of this bond of provision, died on 12th September 1795, and the sum of 7,500*l.*, thereby granted to the late James William Macdonald, became due and payable at Martinmas 1795, and bore interest thereafter till payment.

LORD  
MACDONALD  
v.  
MACDONALD.  
——  
19th Apr. 1835.

Upon the death of Alexander Lord Macdonald, he was succeeded in his lands and estates of Macdonald and Strath by his eldest son, Alexander Wentworth the second Lord Macdonald.

The deed referred to in the bond of provision was a general disposition and trust deed, executed by the said Alexander the first Lord Macdonald, of the same date with the bond of provision, by which he appointed the Earl of Buchan and several other friends, and also his eldest and younger sons, as they should attain to majority, to be his trustees; and disposed and conveyed to them all his lands and heritages whatsoever (excepting the family estates of Macdonald and Strath,) and all personal property, debts, and sums of money that should belong to him at his death, and appointed his said trustees to pay certain provisions to Lady Sinclair and her family, and thereafter to divide the remainder of the whole foresaid trust estate and effects equally among his four younger sons.

Alexander first Lord Macdonald held the estate of Strath in fee simple; and though the estate of Macdonald was held under a deed of entail, executed in 1726, this deed had never been registered in the record of entails. This deed of entail, besides authorizing the heir in possession to contract debts to a certain extent, contained also the following declaration and provision:—  
“ And likewise reserving power and liberty to the said  
“ Alexander Macdonald (the institute) and his heirs

LORD  
MACDONALD  
v.  
MACDONALD.

13th Apr. 1835.

“ above named, to provide their younger children,  
“ besides the heir, with competent provisions, agreeably  
“ to the circumstances of the estate at the time; de-  
“ claring always, that the bonds of provision, so to be  
“ granted by them to their said younger children, shall  
“ be so qualified, that any adjudication to be led or  
“ deduced thereupon shall only subsist as a real secu-  
“ rity for the principal sums, annual rents, and expences  
“ actually disbursed, but that the legal reversions of the  
“ said diligences shall never expire.”

The sums contained in the bond of provision above mentioned did not exceed three years rents of the entailed estate of Macdonald at the time they were granted. It appears that the rentals of the estates of Macdonald and Strath, including the kelp for the years 1793, 1794, and 1795, amounted, after deducting all expences, to about 11,670*l.* yearly; of which rental, the unentailed estate of Strath yielded only about 1,000*l.*

Immediately after the death of Alexander the first Lord Macdonald a meeting of his relatives and friends was held in Edinburgh, which was attended by his eldest son Alexander Wentworth, then Lord Macdonald; by the defender Godfrey Macdonald, his second son; by Sir John Sinclair, and by several other of the trustees, all of whom accepted of the trust, and appointed Mr. John Campbell to be their factor, and gave directions for the management of the trust, as appears from the minute-book kept by these trustees. It also appears from the same record, that a memorial and queries had been prepared for the trustees, to obtain the opinion of Mr. Adam Rolland and the Honourable Henry Erskine, advocates, with regard to the effect of the bond of provision as to the entailed estate of Macdonald. The



opinion given by these eminent lawyers was, that it effectually attached this estate, and that it had reference to the reserved powers contained in the deed of entail. They stated, that comparing the clause in the entail with the rental of the estate, the late lord had not exceeded his powers as an heir of entail in making the bond of provision a burden upon the entailed estate. These provisions they held to be effectual against the succeeding heirs of entail; and they stated, “that the  
 “younger sons to whom the 30,000*l.* is provided, have  
 “no occasion for any farther security. The making  
 “the provision being, as we apprehend, in the power  
 “of the late Lord Macdonald as an heir of entail, his  
 “four younger sons, as creditors in these provisions,  
 “would be entitled, if necessary, to attach the entailed  
 “estate for their payment.”

LORD  
MACDONALD  
v.  
MACDONALD.

13th Apr. 1835.

At the next meeting of the trustees, at which the late Alexander Wentworth Lord Macdonald was present, the memorial and queries, with the opinion of the learned counsel above mentioned, were laid before the meeting; and the minutes bear, “that the 30,000*l.*  
 “provided to the younger children is clearly a burden  
 “upon Lord Macdonald’s estate.”

In a state of the trust affairs laid before that meeting the 30,000*l.* contained in the bond of provision is put down as “a sum left by his Lordship’s settlements as a  
 “burden upon the estate.”

Several years afterwards Alexander Wentworth Lord Macdonald having an intention to borrow some money upon his unentailed estates, while he admitted that the bond of provision formed a burden upon the entailed estate, was desirous to be informed whether this burden

LORD  
MACDONALD  
v.  
MACDONALD.

—  
13th Apr. 1835.

could be made to attach exclusively to the entailed estate, or whether it affected proportionally the unentailed lands of Strath? With the view of ascertaining precisely how the law stood as to this point, and also as to some other matters connected with this bond of provision, a full statement was laid before the late Mr. Solicitor General Blair (afterwards Lord President), and the opinion of this eminent lawyer was requested, as to how far and in what proportions the bond of provision above mentioned would be understood to affect the entailed and unentailed estates, and this query in particular was put to the learned counsel:—  
“In case the above 30,000*l.* shall be considered  
“as applicable proportionally to the whole of his  
“lordship’s estate, what method would be best to  
“fix this, so as to render the security for the 30,000*l.*  
“in the first place, and then of the posterior creditors,  
“indisputable?”

The opinion of Mr. Blair upon this case was very clear and explicit. He says, “I am of opinion that  
“the bond of provision which his lordship granted in  
“favour of his younger children in September 1794,  
“ought to be held and presumed an exercise of the  
“power, which he had by the entail, of burdening the  
“estate of Macdonald, in so far as that power shall be  
“held in fair construction to extend; and that this  
“was the intention of Lord Macdonald seems also to  
“be clear.” He adds, that though there may be some difficulty in fixing the precise amount of the sum which might be made a burden on the entailed estate, he thinks that the amount of three years rents might be taken as a reasonable test for determining the extent of the burden

which the heir of entail was entitled to impose upon the entailed estate. He gives it as his opinion, that the amount, so far as it might be held a reasonable exercise of the power conferred on the heir, “ must be a burden “ on the entailed estate, and the succeeding heirs of “ entail, without relief from Lord Macdonald’s other “ representatives, or from his unentailed estate.” He then says, “ How far the estate of Strath, therefore, can “ be considered at present as a fund of credit, must “ depend in the first place upon the question of law, as to “ any part of the sum provided being ultimately charged “ upon the entailed estate, upon which I have already “ given my opinion, and it is a point upon which I am “ very clear ; and 2dly, upon the exact proportion of “ the total sum provided, which is to be held a burden “ upon the entailed estate.”

LORD  
MACDONALD  
v.  
MACDONALD.  
—  
13th Apr. 1835.

In consequence of the opinions now referred to, all the parties concerned relied that the younger sons were sufficiently secured upon the entailed estate for the payment of the bond of provision in question ; and in particular the late Lord confided therein, that he required to give no further security upon the said estates to them. Every arrangement which took place, and the conduct of all the brothers to the late Lord’s death, proceeded upon this view of the matter ; and it appeared to be perfectly understood by all parties concerned as fixed and settled that the bond of provision was equally effectual in creating an obligation against the heirs of entail, and the heirs succeeding to Strath, as if the provisions therein contained had been created real burdens on these estates by infestment or adjudication.

Upon the 27th of August 1803 the respondent Mr. Archibald Macdonald, in fulfilment of certain mar-

**LORD  
MACDONALD  
v.  
MACDONALD.**  
—  
19th Apr. 1835.

riage articles entered into between him and his wife, assigned and conveyed his claim under the foresaid bond of provision in favour of Sir John Sinclair, and other trustees, for the purposes specified in the deed of conveyance and assignment.

On the 19th day of June 1809 the late Alexander Wentworth Lord Macdonald advanced to the pursuer 2,000*l.* sterling, and on the 23d May 1810 the farther sum of 2,500*l.*, leaving the principal sum of 3,000*l.* still due to the pursuer under the said bond of provision. This sum, with the interest since Whitsunday 1824, remains due to the pursuer; and the question at issue is, whether the present Lord Macdonald, who it is admitted has succeeded to the estates of Macdonald and Strath, is not liable to pay this balance. The respondent, Mr. Archibald Macdonald, is the third son of the late Alexander the first Lord Macdonald.

On the revised cases for the parties being lodged the Lord Ordinary pronounced the following interlocutor:—  
 “ 19th January 1832.—The Lord Ordinary, having con-  
 “ sidered the cases for the parties, finds, that in the  
 “ year 1794 Alexander Lord Macdonald executed a  
 “ trust deed, conveying the whole of his heritable estates,  
 “ with the exception of the estates of Macdonald and  
 “ Strath, and the whole of his moveable property, to  
 “ certain trustees, for the behoof of his younger chil-  
 “ dren: Finds, that at the same time, Alexander Lord  
 “ Macdonald executed a bond of provision for the sum  
 “ of 30,000*l.*, by which, ‘ over and above the other pro-  
 “ ‘ visions settled upon his younger sons out of his sepa-  
 “ ‘ rate estate and effects, he bound and obliged himself  
 “ ‘ and the heirs succeeding to him in his lands and  
 “ ‘ estate of Macdonald and Strath and others lying in

“ ‘the Islands of North Uist and Skye,’ to pay the said  
 “ sum in equal proportions to his younger sons, God-  
 “ frey, Archibald, James, and Dudley Stuart Erskine  
 “ Macdonald: Finds, that the Honourable James Mac-  
 “ donald, in addition to his share of 7,500*l.*, acquired  
 “ right to the sum of 3,252*l.* 10*s.* 4*d.* of the share be-  
 “ longing to his brother Godfrey now Lord Mac-  
 “ donald: Finds, that Alexander Lord Macdonald was  
 “ succeeded in the estates of Macdonald and Strath by  
 “ Alexander Wentworth, the late Lord, who died in  
 “ 1824, and was succeeded in the said estates by the  
 “ present defender: Finds, that no part of the said  
 “ sums of 7,500*l.* and 3,252*l.* 10*s.* 4*d.*, amounting to  
 “ 10,752*l.* 10*s.* 4*d.*, was paid by Alexander Wentworth  
 “ the late Lord Macdonald, and that the present action  
 “ is brought by the pursuers, being three of the execu-  
 “ tors of the Honourable James Macdonald, who died  
 “ in 1814, for their shares of the said sum: Finds, that  
 “ the present pursuers are also the whole executors of  
 “ the late Alexander Wentworth Lord Macdonald, and  
 “ have in the present action been met by the defence,  
 “ that the debt in question, being one for which the late  
 “ Lord Alexander Wentworth was personally liable, is  
 “ a debt properly affecting his executry, and of which  
 “ the defender is entitled to total relief from the pur-  
 “ suers, his executors: Finds, that by the bond libelled,  
 “ creating the obligation, that obligation was expressly  
 “ imposed on the granter and the heirs succeeding him  
 “ in the estates of Macdonald and Strath: Finds, in  
 “ respect of the special terms of the bond, that the  
 “ obligation to pay, though personal, devolved succes-  
 “ sively on the heirs possessing those estates, and that  
 “ therefore the debt, in so far as unpaid by the late

LORD  
 MACDONALD  
 v.  
 MACDONALD.

13th Apr. 1835.

LORD  
MACDONALD  
v.  
MACDONALD.  
—  
13th Apr. 1835.

“ Lord Macdonald, was not one of which the defender,  
“ the heir now in possession of these estates, is entitled  
“ to demand relief from the executry of his predecessor :  
“ Therefore, repels the defences, and decerns in terms  
“ of the conclusions of the libel in regard to the prin-  
“ cipal sum, and also in regard to the interest from the  
“ 19th of June 1824, the period of the late Lord’s  
“ death ; but in regard to the interest falling due during  
“ the possession of the estates by the late Lord Mac-  
“ donald, sustains the defences and assoilzies the de-  
“ fenders: Finds no expences, due and decerns.

(Signed) “ JOHN FULLERTON.”

To this interlocutor his lordship added the following note :—

“ Note.—The defender does not deny his liability for  
“ the debt ; but pleads that he is entitled to be relieved  
“ from the executry of the late Lord Alexander Went-  
“ worth. In the ordinary case this would require to be  
“ made good in an action of relief against the execu-  
“ tors ; but as here the pursuers, claiming equal shares  
“ in the sum pursued for, happen to be also the whole  
“ executors interested in the intestate succession of the  
“ late Lord Alexander Wentworth, the question of relief  
“ admits of being discussed in the form of a defence.  
“ The question thus raised is attended with considerable  
“ difficulty. There seems no reason to doubt that when  
“ a granter of a bond of provision binds his heirs gene-  
“ rally, the obligation on the first heir forms truly a  
“ personal obligation to all intents and purposes, which  
“ will, in the event of payment not being made during  
“ his lifetime, devolve on his executors without relief  
“ from his heir. But the peculiarity of this case is

“ that the bond creating the obligation imposes it  
 “ specially on the heirs succeeding in the estates of  
 “ Macdonald and Strath ; and again, the estates of Mac-  
 “ donald forming by far the most valuable of the two,  
 “ (in the proportion, according to the pursuers, of more  
 “ than eleven to one,) was held by the granter under a  
 “ strict entail, containing a power to grant provisions to  
 “ younger children, while it is not denied by the de-  
 “ fender that the bond of provision in question was  
 “ within that power. Indeed, it is expressly admitted  
 “ in the defender’s case that he is bound, not only as  
 “ the heir in Strath, but as the heir in Macdonald.  
 “ With regard then to the estate of Macdonald, or  
 “ rather such parts of the bond of provision as might be  
 “ ascertained to form a burden on the heir in that en-  
 “ tailed estate, this seems the ordinary case of a debt  
 “ effectually created against the heirs of an entailed  
 “ estate ; a debt as to which, though remaining personal,  
 “ the heir in possession so far from being bound without  
 “ relief (so as to transmit the obligation against his  
 “ general representatives,) is held entitled, even in the  
 “ case of payment, to take assignments enabling his  
 “ general representatives to obtain relief against the  
 “ succeeding heirs of entail. As to the estate of Mac-  
 “ donald, then, it seems to follow from the known rule  
 “ applicable to entailed estates, that by the bond in ques-  
 “ tion the granter intended to create, and did effectually  
 “ ally create, a burden transmissible against the heirs  
 “ successively taking the estate, without relief from the  
 “ executry of their respective predecessors. In regard  
 “ to the estate of Strath, which is unentailed, there is  
 “ more difficulty. The question, how far the heirs of an  
 “ unentailed estate may be successively bound in an

LORD  
 MACDONALD  
 v.  
 MACDONALD.

19th Apr. 1835.

LORD  
MACDONALD  
v.  
MACDONALD.

—  
13th Apr. 1835.

“ obligation merely personal, without relief, except from  
“ their successors, is one which must be of rare occur-  
“ rence, as in such a case the unfettered nature of the  
“ right affords the heir in possession the means of re-  
“ lieving himself. But still the Lord Ordinary perceives  
“ no incompetency or inherent incongruity in constitut-  
“ ing a debt in such a way as to impose the obligation of  
“ debit, though personal, on a certain series of heirs, any  
“ more than in destining a personal right of credit to such  
“ series of heirs, of which last the competency cannot be  
“ doubted. The question, then, is one purely of inten-  
“ tion; and considering the terms and whole tenor of  
“ the bond of provision, and its effect according to the  
“ ordinary rule, in regard to the entailed estate of Mac-  
“ donald, the Lord Ordinary thinks, that it does contain  
“ a sufficient expression of intention, even as to both  
“ estates, that the obligation, so long as unperformed  
“ should devolve successively on the heirs taking those  
“ estates; and that, in absence of any deed of the late  
“ Lord Alexander Wentworth altering that arrange-  
“ ment, it must be held, in a question inter hæredes, like  
“ the present, to have been his intention that the debt  
“ should be paid by the heirs of the estates, the debtors  
“ appointed by the bond, without relief from his own  
“ executry. Upon these grounds, supported by the  
“ analogy drawn from the unquestioned practice in the  
“ case of entailed estates, the Lord Ordinary has re-  
“ pelled the defence in so far as it is pleaded against the  
“ claim for the principal and for the interest accruing  
“ since the present Lord became liable by succeeding to  
“ the estates. He cannot, however, extend the principle  
“ beyond what is warranted by that analogy. He has  
“ therefore considered the interest accruing during the



“ possession of the estates by the late Lord Alexander  
 “ Wentworth as properly a debt due by him in his in-  
 “ dividual character, to which the defender’s claim of  
 “ relief against the executry is applicable ; and, as it is  
 “ not denied by the pursuers that the executry of the late  
 “ Lord is sufficient for that purpose, he has sustained the  
 “ defence in regard to that interest.”

LORD  
 MACDONALD  
 v.  
 MACDONALD.  
 —  
 13th Apr. 1835

(Signed) “ J. F.”

The above interlocutor having been brought by a re-claiming note under the review of the Second Division of the Court, their lordships, by a majority, adhered to that judgment, and, of this date, pronounced the following interlocutor :—

“ Edinburgh, 29th May 1832.—The Lords, having  
 “ considered this reclaiming note, with the other pro-  
 “ ceedings, and heard counsel, adhere to the interlocu-  
 “ tor of the Lord Ordinary, and refuse the desire of  
 “ this note.”

The following are the opinions delivered by the judges of the Second Division on which the above interlocutor is founded :—

*Lord Cringletie.*—“ I think the interlocutor of the  
 “ Lord Ordinary is right. The provision was laid by  
 “ the first Lord Macdonald on the heirs succeeding  
 “ to him in his lands and estates of Macdonald and  
 “ Strath ; and it appears to me, from the deed which  
 “ he afterwards executed, conveying his whole estate,  
 “ personal and moveable, to trustees for the purposes  
 “ therein stated, that it never could have been in his  
 “ contemplation that any of the heirs should be bound  
 “ to pay the provision, except the heirs succeeding to  
 “ the estates of Macdonald and Strath. This I conceive

LORD  
MACDONALD  
v.  
MACDONALD  
—  
18th Apr. 1835.

“ to be perfectly clear as the intention of the granter of  
“ that bond. The Dean of Faculty says that the ques-  
“ tion is not as to what was the intention of the maker  
“ of the bond, but that this being a personal bond, which  
“ the second Lord Macdonald ought to have paid, the  
“ question is, whether, he having died intestate, the  
“ burden is not to fall on his executors? I think, that  
“ if it was the intention of the first Lord Macdonald to  
“ lay the burden on the heirs of Macdonald and Strath,  
“ that just goes to answer that very question. If it be  
“ once ascertained that the burden is laid on the heirs  
“ of Macdonald and Strath exclusively, then I appre-  
“ hend that it so remains so long as it is unpaid. The  
“ Lord Ordinary has remarked in his note, that ‘ there  
“ ‘ seems no reason to doubt, that when a granter of a  
“ ‘ bond of provision binds his heirs generally, the  
“ ‘ obligation on the first heir forms truly a personal  
“ ‘ obligation to all intents and purposes, which will, in  
“ ‘ the event of payment not being made during his life-  
“ ‘ time, devolve on his executors without relief from his  
“ ‘ heir.’ Most unquestionably without relief. Put the  
“ case, that the second Lord Macdonald had not lived  
“ a fortnight after succeeding to the property, and had  
“ left a great personal succession, would there have been  
“ a particle of justice in saying, that an heir of his  
“ having succeeded to the estates, his executors should  
“ notwithstanding be liable to pay this debt in the bond  
“ of provision? I cannot conceive that such an argu-  
“ ment could be raised with any justice at all, or with  
“ even the appearance of justice. The obligation remains  
“ upon that in the original bond, and just where it was,  
“ upon those succeeding to the estates. It was an  
“ obligation against the first heir, and against all the

“ heirs, and either of them could have kept it up as a  
 “ debt against the estates of Macdonald and Strath, if  
 “ they had paid it. It would just have remained as it  
 “ had stood before, a debt upon the estate, for which  
 “ the estates were liable.”

LORD  
 MACDONALD  
 v  
 MACDONALD.

13th Apr. 1835.

*Lord Glenlee.*—“ As to the executors of the first  
 “ Lord Macdonald, there can be no possible doubt that  
 “ there can be no claim against them in consequence of  
 “ the declaration in the bond ; but not in respect of the  
 “ terms of the bond, binding himself and the heirs in  
 “ Macdonald and Strath to pay, but from the reference  
 “ it makes to the other deed he granted at the same time.

“ If the question was of such a nature as admitted of  
 “ my thinking of the matter at all, I think that what he  
 “ would have said would have been different from what it  
 “ is alleged he said.

“ There is nothing in the deed which seems to me to  
 “ imply that the heirs succeeding in the estates should  
 “ not only be liable as heirs, but also that they should  
 “ be liable without relief against the executors of the  
 “ preceding heirs. I think that there can be no doubt  
 “ that the second Lord Macdonald was the proper  
 “ debtor in this bond, so long as he lived, and that the  
 “ creditors under it might have attached his moveable  
 “ funds of every kind, wherever they were to be found,  
 “ for payment. But when he died, did this right to  
 “ attach his moveable funds expire at once with himself?  
 “ I take it that the truster might have made a provision  
 “ to the daughter of the eldest son, who had predeceased  
 “ him. Suppose the granter had conceived this provi-  
 “ sion in favour of a daughter of his eldest son, pre-  
 “ deceasing him, this daughter would have thus been  
 “ the creditor of her uncle, a second son succeeding to

LORD  
MACDONALD  
v.  
MACDONALD.

—  
13th Apr. 1835.

“ the estates and excluding her; would she not have  
“ had him, and his whole estate, real and personal,  
“ bound by this provision?—and could she lose this  
“ recourse upon his estate by his death?—and could it  
“ be said to her, you are not entitled to confirm as  
“ executor-creditor to him after his death, so as to attach  
“ his moveable funds, although during his life you could  
“ do so? If he had been alive you might have taken  
“ them, and during his life you ought to have secured  
“ yourself, or obtained payment out of any funds he  
“ had. Would this power have been lost at once  
“ by his death? And can it be said you cannot confirm  
“ as executor-creditor to him, because it was the inten-  
“ tion of the granter of the bond that it should be paid  
“ by the heir, and not from the moveable funds? I  
“ have no idea of that at all.

“ As the case has happened, some of the parties here  
“ are both creditors under the provision and executors.  
“ I think it will not do to say that their being executors  
“ eo ipso subjects them to the claim; but I think that,  
“ so far as there is an excrescence of moveable funds  
“ over and above paying the debts of the second Lord  
“ Macdonald, they are liable pro tanto to the relief of  
“ this claim. I have no idea that because they were  
“ creditors of the second Lord Macdonald, and were  
“ also his executors, this claim thereby became extinct.  
“ That is absurd: they were just as much creditors as  
“ executors. By our old law an executor, who was  
“ also a creditor, had a preference, and was entitled to  
“ pay himself out of the executry. That has been  
“ altered, no doubt; but the executor still remains a  
“ creditor. It follows from this, as matter of necessity,  
“ that unless there is an excrescence to which these

“ people have succeeded, over and above the debts due  
 “ by the second Lord Macdonald, there is no claim of  
 “ relief against the executors.

LOED  
 MACDONALD  
 v.  
 MACDONALD.

13th Apr. 1835.

“ I think the claim of relief must be limited to the  
 “ excrescence of the whole moveable funds left by Went-  
 “ worth Lord Macdonald, over and above his debts ;  
 “ but I think to that extent the claim good.

“ I see that the Lord Ordinary has thought, that if  
 “ the whole estates had been unentailed, the question  
 “ would have been very doubtful ; and he founds very  
 “ much on the analogy drawn from questions applicable  
 “ to debts upon entailed properties. Now, I do not see  
 “ the inference, that because the first Lord Macdonald  
 “ declared that himself and his heirs succeeding to him  
 “ in these estates should be burdened with the provision,  
 “ that all claim against his funds, so soon as he died, did  
 “ necessarily disappear, and that his executors were not  
 “ liable.

“ We have nothing before us as to the deed of entail,  
 “ except one very short quotation ; and there is no doubt  
 “ in my mind, that that quotation gives no power to the  
 “ heirs to burden the estate with debts. All it does say  
 “ is, that the institute and other heirs should be entitled  
 “ to grant reasonable annuities to younger children ;  
 “ but it confers no powers, as many entails do, to make  
 “ these a burden upon the estate at all. The only effect  
 “ is, that the irritant and resolute clauses do not strike  
 “ against the heir. No doubt, such a provision is a good  
 “ debt against every person who succeeds to the estate.  
 “ It stands as an entailer’s debt, which, in common par-  
 “ lance, is said to affect the estate ; but every body knows,  
 “ that although the entailer’s debt, in this sense, affects  
 “ the estate, yet, like every other debt, it is due by the

LORD  
MACDONALD  
v.  
MACDONALD.  
—  
19th Apr. 1835.

“ heir, and by every body who represents that heir. All  
“ the entail authorizes is simply to contract the debt;  
“ and I hold it to be contrary to the entail to say that  
“ it is confined to the estate, and that therefore the  
“ heirs, and the heirs only, who succeed under the en-  
“ tail, shall be liable for payment of the provisions with-  
“ out relief.

“ I think this case is to be judged of just like a per-  
“ sonal debt, for which all the heirs are liable, but which  
“ does not exclude the right of the creditor to go against  
“ the funds of any heir who is really subject for that  
“ debt. The diligence can only be valid to the effect of  
“ securing the money, and not to that of carrying off  
“ the estate.”

*Lord Meadowbank.*—“ I concur with Lord Cringletie  
“ in the conclusion to which he has come. But at the  
“ same time, I apprehend that it is not the intention of  
“ the first Lord Macdonald which must regulate the  
“ question. I may state my opinion in one sentence.  
“ It appears to me that this estate was primarily liable,  
“ and if the estate was not relieved of the debt it  
“ appears to me that it was the intention of the last  
“ Lord Macdonald to leave it as a debt, for which the  
“ heir, and not his executors, was liable.”

*Lord Justice Clerk.*—“ Upon reading these papers, I  
“ have formed an opinion in favour of the interlocutor  
“ of the Lord Ordinary, and very much on the same  
“ grounds as stated by his lordship. I cannot permit  
“ my opinion to go on the grounds stated by Lord  
“ Meadowbank as to the intention of the late Lord  
“ Macdonald. We must look to the purpose for which  
“ the bond was granted, with reference to the marriage  
“ contract. After having made a deed, conveying the

“ whole of his funds out and out—every farthing, in  
 “ short, of which he was possessed—he executed a bond  
 “ of provision, which proceeds on the narrative that in  
 “ consequence of the great increase of the rental of  
 “ Macdonald and Strath since the date of the marriage  
 “ contract, and that it was likely to increase still more,  
 “ he therefore, for love and favour which he had for his  
 “ children, declared he was to make this additional pro-  
 “ vision in their favour, over and above the other pro-  
 “ visions by the bond, by which he laid an obligation on  
 “ the heir succeeding to him in the estates of Mac-  
 “ donald and Strath. I have no doubt whatever, that  
 “ it was the intention to make the heirs, and heirs alone,  
 “ liable. The estate of Macdonald is an entailed estate,  
 “ and there is, I apprehend, no doubt that that would  
 “ be a good, valid, and effectual burden over that estate.  
 “ There is no doubt the specialty here, that the estate  
 “ of Strath is not entailed; but the bond nevertheless  
 “ declares, that it is the heirs succeeding to both estates  
 “ of Macdonald and Strath that shall be liable for the  
 “ provision there made. When I see this man giving  
 “ over every thing he had in the world to trustees, for  
 “ the purpose of making these provisions, I conceive it  
 “ to be a clear declaration of that person, that the pro-  
 “ vision shall form a burden upon both estates, although  
 “ the one was entailed and the other not. Then the  
 “ first Lord Macdonald is succeeded by the second Lord  
 “ Macdonald, and no doubt this person was, in terminis  
 “ of the bond, bound to pay the provision. His rents  
 “ might have been attached, his funds might have been  
 “ seized, and the unentailed estate might have been  
 “ brought to the hammer, and sold off. I have no doubt  
 “ of that at all. As to the entailed estate, it might have

LORD  
 MACDONALD  
 v.  
 MACDONALD.  
 —  
 13th Apr. 1835.

LORD  
MACDONALD  
v.  
MACDONALD.

13th Apr. 1835.

“ been made effectual against it too ;—all that certainly  
 “ might have been done, though it was not. The second  
 “ Lord Macdonald lives for sometime, and dies, leaving  
 “ the provision unpaid ; and then the question comes to  
 “ be, whether the present Lord is answerable for this  
 “ debt, he being in possession of both estates of Mac-  
 “ donald and Strath ? As to this being merely an en-  
 “ tailer’s debt, and not a real burden, and one which  
 “ can only be made effectual in the usual way, I am  
 “ satisfied of that ; but here, when there is a manifest  
 “ declaration of purpose and intention, I think the  
 “ authorities quoted in these papers are sufficient to  
 “ show that it must be given effect to. I can conceive  
 “ difficulties to arise, if Lord Macdonald had said, I  
 “ will not take Strath ; but he does not say that ; no such  
 “ thing. He takes that estate ; and I hold that there  
 “ are authorities to shew clearly, that where the will  
 “ and purpose are expressed, that will and that purpose  
 “ must be given effect to. Therefore I am of opinion,  
 “ that we are bound to make the provisions be paid out  
 “ of the fund which was expressly destined for that  
 “ very purpose by the will and declaration of the  
 “ granter ; and I think that the second Lord Macdonald  
 “ did nothing to alter that liability, and did nothing to  
 “ affect that will.”

The Court adhered.

Against these interlocutors an appeal was presented, and the original appellant, Godfrey Bosville Lord Macdonald, having died in the month of October 1832, and having been succeeded by his son Godfrey William Wentworth now Lord Macdonald, the present appeal was ordered to be revived upon his petition.



*Appellant.*—The question in this case relates exclusively to the succession of the last Lord Macdonald, as no claim could lie against the executors of the first Lord Macdonald, and is one of Scotch law and of principle. The debt due by the late Lord Macdonald having been merely a personal obligation, and not having been made a real burden upon the estates, must be borne by the executor, and not by the heir in a question of relief between those two parties. It is not pretended that the debt was heritable, or secured on the estates; indeed, it is expressly found by the Lord Ordinary, and distinctly admitted in his note, that the debt was personal; and of this none of the judges appear to have entertained any doubt. That being the case, has the late Lord Macdonald done any thing whatever to exclude the established right of relief which his heir, by the law of Scotland, has from the executors of any personal debt which the heir may be called upon to pay? On this question the case depends. The rule of law is expressly stated by Mr. Erskine in these terms :—“ The law itself  
 “ has divided succession into two branches, the heritable  
 “ and the moveable, and as each of these ought to bear  
 “ the burdens which naturally attend it, the heir is the  
 “ proper debtor in heritable debts, because he succeeds  
 “ to all the subjects upon which these debts are secured,  
 “ and the executor is primarily liable in the moveable  
 “ debts, because he is considered as heir in the moveable  
 “ estate.” The late Lord Macdonald was debtor to the respondents, his younger brothers and sisters,—debtor in an obligation which was personal. Now, knowing that, and knowing that if he makes no settlement they will succeed to his executry, he thinks it best to leave it to them, just because he is largely their debtor. A

LORD  
 MACDONALD  
 v.  
 MACDONALD.

18th Apr. 1835.

LORD  
MACDONALD  
v.  
MACDONALD.

—  
13th Apr. 1835.

donation to them, at the expence of the heir in the heritable property, is surely not to be presumed. Debitor non presumitur donare. They were not nearer to him in blood, or more connected by affection. The case is not that of a father leaving a large landed estate to his eldest son, and providing for his younger children. The last Lord had no such motives to influence him. If he had intended really to make a donation of his executry, over and above the provisions due by himself under his father's settlement, which he had not paid, the presumption is, that he would have made a deed to that effect; that he would not have died intestate, but that he would have said, like his father, "I think you ought to have my whole executry, besides claiming from our brother, who succeeds to me in my estates, the provisions in your favour executed by our father." Certainly, if Lord Macdonald had ever formed such a notion in his mind, the reasonable presumption is, that he would have executed a deed to that effect. But, besides the utter improbability of such being his intention, the natural explanation of his conduct, (if conjectures as to his intention can be safely hazarded at all) is, that seeing these provisions still remained due by him, amounting to a very considerable sum, he allowed the respondents to take his executry on that very account, that he might thereby pay off that debt, and giving them at the same time the benefit of any surplus which there might be.

That such was a very probable view to pass through his mind, and that there is not one single scrap of evidence militating against such an inference, cannot be disputed. Thus, for aught that appears, the Court may in fact have deviated from the ordinary and esta-

blished principles of law, by conjectures as to the views of the late Lord Macdonald, which may have been exactly the opposite of those which did pass through his mind.

LORD  
MACDONALD  
v.  
MACDONALD.  
—  
13th Apr. 1835.

Upon analyzing the opinions of the judges it will be seen that there is not one single ground upon which this personal debt is thrown upon the heir, without the established relief against the executor, which does not depend upon conjectural views of the intention of a party who died intestate without any sort of evidence of his own intentions.

In cases of intestate succession, there can logically and upon sound principle be no room for speculation as to a party's intention. The law enables every man to regulate his own succession, and establishes certain rules and certain principles in case a party dies without expressing and giving effect to his own will. Now, that being the case, the law holds that there is no intention of the deceased, who has died intestate, to guide or influence the succession to his property, and on that ground his succession falls under general principles. There can be no such thing as a special case of intention in a case of intestate succession; such an idea seems a contradiction in terms. If the party wished any special rule to be adopted as to the succession of his affairs, it was his business, and within his power, to have expressed such an intention. Nay, the law holds that if he had entertained any such special intention he would have expressed it; and upon the assumption, therefore, that the deceased had no special intentions whatever, the law proceeds to distribute his affairs, and to regulate his succession upon rules and principles which have no sort of reference to his views or wishes; besides any attempt

LORD  
MACDONALD  
v.  
MACDONALD.

18th Apr. 1835.

to decide questions occurring in intestate succession, by speculations as to the deceased's views and wishes, is to be deprecated.<sup>1</sup>

*Respondents.*—From the whole tenor of the bond of provision by the first Lord Macdonald, and the trust deed executed by him of the same date, 24th September 1794, and bearing reference to each other, it appears that the granter not only declared his intention, but expressed this in the most clear and explicit terms that could have been made use of, to make the provision of 30,000*l.* in favour of his four younger sons a burden upon the family estates of Macdonald and Strath.

In the personal bond of provision, the words of the granter are, “ I do therefore hereby, with and under  
“ the provisions and conditions after specified, and over  
“ and above the other provisions settled upon my  
“ younger sons, out of my separate estate and effects,  
“ by a deed of this date, bind and oblige myself, and  
“ my heirs succeeding to me in my lands and estate of  
“ Macdonald, Strath, and others,” &c. to content and pay 7,500*l.* sterling, to each of his four younger sons, and that at the first term of Whitsunday or Martinmas next and immediately following his death, with a fifth part of penalty and interest. This was the usual and appropriate style of a personal bond of provision, and was agreeably to the reservation in the entail. The term of payment came to be Martinmas 1795, and as

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<sup>1</sup> Erskine, B. 3. T. 9. Sec. 48; Sandford on Heritable Succession, vol. ii. p. 49; Russel v. Russel, 23 Jan. 1745 (5211); Denham v. Denham, 8 March 1765 (5244); Mullo v. Mullos, 20 Dec. 1758 (5228); Campbell v. Campbells, 14 Jan. 1747 (5213); Sandford on Heritable Succession, vol. ii. p. 241; Russel v. Dall, Sandford on Heritable Succession, vol. ii. p. 244; Durie, 7 March 1629; Falconer, (Dict. 12, 487.)

the principal sums bore interest from that time, they then became vested interests in the four younger sons, and at their disposal, although all of them were then in minority. So in case of the death of any one or more of them intestate, after the term of payment, their provisions would have fallen by law to their surviving brothers and sisters, as their nearest in kin. But to prevent this legal consequence, the bond of provision contained the following declaration :—“ That in the  
 “ event of the decease of any of my said sons as said is,  
 “ before marriage or majority, the provision hereby  
 “ made in his or their favour, shall accresce and belong  
 “ to Alexander Wentworth Macdonald, my eldest son  
 “ or other heir succeeding to me in my lands and estate  
 “ of Macdonald ;” which declaration confirms the intention of the granter to have been, that as the heirs in the family estates were to be liable for the provisions to the younger sons, on attaining to majority or marriage, so these heirs were to be relieved or reimbursed of that provision in case of the failure of any of the sons before either of these events : and again, the bond of provision “ revokes all former provisions made by me  
 “ in favour of my younger children out of my said  
 “ estates of Macdonald and Strath,” but without prejudice to the other provisions settled upon them, out of my separate estate and effects, by a deed of this date, These expressions explicitly declare the provisions to have been made payable out of the estates of Macdonald and Strath.

The trust deed of the same date proves the same intention. It conveys to the trustees all lands and heritages, “ other than the estates of Macdonald and “ Strath ;” and it declares that the provisions to the

LORD  
MACDONALD  
v.  
MACDONALD.

13th Apr. 1835.

**LORD  
MACDONALD  
v.  
MACDONALD.**  
—  
13th Apr. 1835.

younger sons under that trust deed, “are over and  
“above certain provisions settled upon them out of my  
“separate estates of Macdonald and Strath:” and the  
trust deed declares, that in case any of them should die  
without issue, their shares of the trust funds shall  
accresce to the whole surviving children. This shows  
the marked distinction drawn betwixt these general  
trust funds and the provisions payable out of the estates  
of Macdonald and Strath, which in the like event were  
to revert to the heir in possession of these estates.

The late Alexander Wentworth Lord Macdonald  
was not the proper or primary debtor, in regard to the  
balance due under the bond of provision in question.  
The heirs who have succeeded to the estates of Mac-  
donald and Strath, and who for the time have enjoyed  
these estates, are the proper and primary debtors, by  
whom the balance due to the respondents under this  
bond of provision must be paid.

The late Alexander Wentworth Lord Macdonald  
was not the personal debtor for the sums payable by the  
bond of provision; it was not a debt contracted by him-  
self, and for which his representatives could alone be  
made liable. On the contrary, he was responsible for  
the payment of this debt, merely as one of the heirs who  
succeeded to the estates of Macdonald and Strath. The  
debt in question was created a burden upon the heirs  
succeeding to these estates; and it will be observed the  
obligation was not upon the first heir alone, but upon all  
the heirs who might succeed to these lands. It forms a  
burden upon, and, strictly speaking, is inseparable from  
the right of succession, and is thus to every practical  
effect, in so far as heirs are concerned, a real burden  
upon the property.

Where a proprietor, by his settlement, expressly appoints certain sums of money to be paid by the heirs succeeding to him in particular estates, he charges those estates with the payment of the money, as clearly, nay much more unequivocally than if he had made the sums of money real feudal burdens upon the estate in the most technical form, and at the same time had obliged his heirs and executors personally to pay the debts. The rule, in all cases, for determining by whom such debts are primarily to be paid, is the will of the testator, express or implied. When a person says that such a sum is to be paid by his heirs succeeding to such an estate, how can it be doubted that such heirs are the primary debtors against whom a claim for payment will lie?

LORD  
MACDONALD  
v.  
MACDONALD.  
—  
13th Apr. 1835.

That this is the doctrine of the law of Scotland might be established by reference to many authorities. Thus Lord Stair says, “Heirs are not convenable at  
“the creditor’s option, as in the case of heirs and exe-  
“cutors; but they have the benefit of an order of dis-  
“cussing. Thus, first, debts, and obligations relating  
“to any particular lands or rights, and no other, do in  
“the first place affect the heirs who may succeed in  
“these lands or rights, before the heir-general. So an  
“obligement obliging the defunct’s heirs of line or  
“tailzie, so soon as they should come to his estate, was  
“found to affect the heir of tailzie who came to that  
“estate, without discussing the heir of line; Hope (de  
“hæredibus), Lyon contra Scott. So an obligation  
“obliging a debtor, and his heirs male succeeding in  
“such an estate (which was provided to heirs male),  
“and all other heirs and successors, was found to burden  
“the heirs male before the heir of line or executors;

LORD  
MACDONALD  
v.  
MACDONALD.

13th Apr, 1835.

“ July 22, 1662, Anderson contra Wauchop. So like-  
“ wise an obligation to infest a party in an annual rent  
“ out of lands designed, was found to affect the heirs of  
“ provision of these lands, without discussing the heir of  
“ line; Edmonstone contra Edmonstone. This was  
“ also the opinion of the Lords, though there was no  
“ decision in it; 19th February 1611, Blair contra  
“ Fairly: and in these cases the heir of tailzie or pro-  
“ vision will have no relief against the heir of line, or  
“ other nearer heirs of blood, who otherwise, and also  
“ executors, must be discussed before heirs of provision  
“ or tailzie.”

And again, Lord Stair says, “ There is likewise a  
“ petitory action founded upon the mutual obligations  
“ of heirs and executors for relief of the moveable debts  
“ whereby the heir is distressed, and of the heritable  
“ debts whereby the executor is distressed; for creditors  
“ have action against either or both of them, for any  
“ debt of the defunct. But creditors have not the same  
“ access against heirs of line, male, tailzie, and provi-  
“ sion, there being an order of discussion among them,  
“ that the posterior heir cannot be distressed till the  
“ heirs prior in order be discussed, unless the defunct  
“ have burdened one special heir only.”

To the same purpose Mr. Erskine says, “ Though  
“ proper heirs are all at last liable universally for the  
“ debts of their ancestor, yet they must be sued in a  
“ certain order. Some heirs are liable in the first place,  
“ and others not till those who are primarily liable have  
“ been discussed. Thus in the case of obligations rela-  
“ tive to a particular subject, the heir who succeeds in  
“ that subject may be sued without discussing any other  
“ heir; for whoever succeeds in a right must be the



“ proper debtor, in any burden chargeable upon that  
 “ right. Thus also in debts which the debtor’s heir  
 “ male is burdened with the creditors may sue such heir  
 “ without taking notice of the heir at law ; nay, he can-  
 “ not insist against the heir at law till the special heir  
 “ be first discussed ; 18th February 1663, Blair v. An-  
 “ derson.”

LORD  
 MACDONALD  
 v.  
 MACDONALD:  
 ———  
 13th Apr. 1895.

Mr. Erskine lays it down as a clear proposition, that  
 “ the conveyance of a debt affecting an entailed estate,  
 “ in favour of the heir of entail and his heirs what-  
 “ soever, does not import a perpetual extinction of the  
 “ debt. The debt is indeed dormant during the life  
 “ of the disponee ; but if the heir at law and the heir  
 “ of entail happen, at any time after, to be different  
 “ persons, the ground of the extinction, or rather of  
 “ the suspension, ceaseth, and consequently the debt  
 “ will revive in the person of the heir at law against  
 “ the heir of entail ; for it is considered as a separate  
 “ estate, in the absolute power of the heir who pur-  
 “ chased it, and affectable by his creditors. Nay, though  
 “ the deed assigning the debt to the heir of entail should  
 “ also contain a discharge of it in his favour as having  
 “ made the payment, the discharge hath not the effect  
 “ of extinguishing it confusione, seeing that part of the  
 “ deed which assigns it is a sufficient indication that it  
 “ should still continue to subsist in his person.”

The second Lord Macdonald, upon succeeding to the  
 lands of Macdonald and Strath, became clearly liable to  
 this burden. So far as the late Lord Macdonald left any  
 part of this burden undischarged, he must be held to  
 have indicated his intention that the future heirs suc-  
 ceeding to the estates of Macdonald and Strath should  
 continue burdened, as he himself was, in terms of the

LORD  
MACDONALD  
v.  
MACDONALD.  
—  
19th Apr. 1835.

bond of provision. If the first Lord Macdonald had executed a deed of entail of his lands of Strath, or a new deed of entail of the barony of Macdonald, and had therein expressly bound his heirs of entail to pay the sums in question, surely there can be no doubt that these sums, so far as undischarged at the death of the first heir, would have been a burden upon the present Lord Macdonald and all the succeeding heirs of entail: and it makes no difference whether the burden was created by a deed of entail or by any other deed, provided the proprietor of the lands and the granter of the deed has indicated his intention of making a certain class of heirs primarily liable for the debt or obligation in question.

This is the rule by which all questions of this kind must be determined. A personal obligation is, no doubt, *primâ facie* binding upon executors, and is payable out of the personal estate. But the granter of the deed may, if he pleases, declare and appoint that this personal obligation shall affect his heirs male or his heirs of line, or his heirs succeeding to him in particular estates; and his declared will, in regard to this matter, will ascertain which class of his heirs or representatives shall be primarily liable for the fulfilment of this obligation. The will or presumed will of the proprietor is the rule by which all questions of relief between heirs and executors must be ultimately determined. The rule of giving effect in questions of relief to the presumed or express will of the deceased proprietor has been long recognised in England; and there are many cases in which it has been ruled in the Courts of that country that the personal estate may be exempted from liability for personal debts, without any express words, provided there be

“plain intention,” and “necessary implication,” or “declaration plain,” sufficient to convince the judge that such was the meaning of the testator. In the late case of *Boote v. Blundell*<sup>1</sup>, the Lord Chancellor has entered fully into the discussion of this doctrine. In all such cases, the principle, both in this country and in England, is, that the primary fund, or what is presumed to be so, must exonerate the auxiliary. In general, such questions must be determined upon presumptions as to the intention of the granter of the deed. In the present case all doubt as to this matter is removed, the granter having expressly declared that the debts in question should affect his heirs succeeding to him in particular estates. That this is a personal obligation can be of no importance in a question *inter hæredes*, because in such questions the point is not what is the nature of the debt abstractly considered, whether heritable or moveable, but upon whom has it been thrown, in the first instance, by the testator or granter of the deed? Who, in short, are the primary debtors under the deed?

LORD  
MACDONALD  
v.  
MACDONALD.  
—  
18th Apr. 1835.

It can never for a moment be doubted that a direct action lies at the instance of the younger children of the first Lord Macdonald against the present Lord Macdonald, as the heir succeeding to the estates of Macdonald and Strath, for the payment of the sums due upon the bond of provision. This was no proper or personal debt of the late Lord Macdonald. It was due by him merely as one of the heirs succeeding to these estates; but, as already mentioned, he was entitled to keep it up against the future heirs, by paying it upon assignation. He has done the same thing by allowing

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<sup>1</sup> 10 Ves. 494.

LORD  
MACDONALD  
v.  
MACDONALD.  
—  
18th Apr. 1835.

the debt to remain a burden upon the heir succeeding to the estates, of which burden no discharge has ever been granted, and thus leaving the obligation as it stood at the death of the first Lord Macdonald. The question now at issue is purely a question of relief. The point is, whether the present Lord Macdonald, as succeeding to the lands of Macdonald and Strath, being indubitably and primarily liable for the balance due upon the bond of provision, be entitled to claim relief from the separate funds and estate of the last Lord Macdonald? How such a claim of relief can be made by the heir who is by the deed itself declared to be primarily liable, it is not easy to understand.

It has been said, indeed, that the first Lord Macdonald bound himself, and his heirs succeeding to the estates of Macdonald and Strath, to pay the sums in question; and it has been suggested, that the present Lord Macdonald is not one of the heirs of the first Lord Macdonald, but only an heir succeeding to the second Lord Macdonald. It need scarcely be observed, that this is a mere play upon words; and that, in legal phraseology, the present Lord is the heir of the first Lord Macdonald, in the estates of Macdonald and Strath, as much as the second Lord. But suppose it were correct that the present Lord Macdonald were to be held merely the heir of the late Lord in the estates of Macdonald and Strath, how would this vary the question at issue? The last Lord was liable for the sums in question, not as personal debts contracted by himself, but solely as burdens consequent upon his taking up the succession to the estates of Macdonald and Strath. His right to these estates, there can be no question, was burdened with the payment of the bond of provision;

and if the present Lord shall take up these estates as heir of the last Lord, upon what principle can he claim them free of the burden under which they were held, and under which they have been transmitted by the late Lord? <sup>1</sup>

LORD  
MACDONALD  
v.  
MACDONALD.  
—  
13th Apr. 1835.

LORD BROUGHAM:—My Lords, This case relates to the execution of certain bonds, and their operation, whether on the real or personal estate. The noble and learned Lord who heard the argument in its commencement, but who was prevented by the pressure of business from hearing it throughout, entertained with myself some doubts upon the grounds of the decision in the Court below; but on a further consideration of the case those doubts have been entirely removed, and I am clear that the decision of the Court below ought to be affirmed. I think, on consideration, that it is reconcileable with the authorities; at all events, I am quite certain, that, on the principles of the law as it now exists in Scotland, the decision is well founded. I would therefore move your Lordships that the interlocutors be affirmed.

The House of Lords accordingly ordered and adjudged,  
“That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors therein complained of, be, and the same are hereby affirmed.”

MACDOUGALL and BAINBRIDGE — SPOTTISWOODE and  
ROBERTSON,—Solicitors.

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<sup>1</sup> 3 Stair, 5, 17; 3 Ersk. 4, 52. and 4, 27; Blair v. Anderson, 18 Feb. 1663 (3,571); Kerr v. Turnbull, 15 Feb. 1758 (15,551); Gordon v. Sutherland, 29 Jan. 1731 (11,534); Temple v. Gairns, 22 Feb. 1706 (15,355); Crawford v. Hotchkis, 11 March 1809 (Fac. Coll. xv. 258, No. 88.); Rose v. Rose, 2 April 1787 (Fac. Coll. ix. App. 17.); Bootle v. Blundell, 19 Ves. 494; Gordon v. Maitland, 1 Dec. 1757 (10,050).

[13th April 1835.]

JOHN NAPIER, Appellant. — *Dr. Lushington.*

Miss XAVERIA GLENDONWYN and the Representatives  
of Alexander Crombie, assignee of Lady Gordon  
or Glendonwyn, Respondents. — *A. Wood.*

*Right in Security—Husband and Wife.*—A husband was proprietor of an estate subject to payment of the price to three heirs portioners, one of whom was his wife ; he granted an heritable bond and disposition in security to a creditor, and the wife assigned in farther security her one third share and interest thereof. The husband having become bankrupt, and there being a deficiency in the price, held, in a question between the two heirs portioners, and the creditor as assignee of the wife, (affirming the judgment of the Court of Session,) that the two heirs portioners were preferable to the interest of her third share, to the effect of recovering full payment of their respective shares.

1ST DIVISION.

Lord Newton.

WILLIAM GLENDONWYN of Glendonwyn was proprietor of the estate of Parton, and acquired by marriage the estate of Crogo, both situated in the Stewartry of Kirkcudbright. Of this marriage there were three daughters, Mary Lucy Elizabeth, who was married to Sir James Gordon of Letterfowrie, Ismene Magdalena, married to William Scott, and Miss Xaveria Glendonwyn. On the 22d of April 1809 Mr. Glendonwyn, by

a minute of salesold to Mr. Scott the estate of Parton for 60,500*l.*<sup>1</sup> By the minute of sale it was declared “ that, during the life of the said William Glendonwyn, “ no interest shall be payable by the said William Scott “ upon the remaining sum of 10,000*l.* sterling ; which “ principal sum of 10,000*l.* sterling is to be secured to “ the said William Scott and Mrs. Magdalena Glendon- “ wyn, and spouse of the said William Scott, in manner “ following, viz. the interest of the said sum is to be “ liferented by the said William Scott and Mrs. Ismene “ Scott his spouse, during their lives, and during the “ survivor of them ; and the said principal sum of “ 10,000*l.* to be the property of and divisible amongst “ the issue of the marriage, male and female, as the “ said parents may jointly direct by any settlement “ under their hands ; and in default of such direction, “ amongst the issue as the survivor may direct by deed “ or will ; and in default of issue, as the said Mrs. Is- “ mene Magdalena Glendonwyn alias Scott may direct “ by her own will and settlement : And further, the said “ William Glendonwyn promises, out of the said “ interest, to pay to his daughter, the said Mrs. Ismene “ Magdalena Scott, during his life, the sum of 200*l.* “ sterling yearly, for her own separate use, free from “ the debts and control of her present or any future “ husband, as in the nature of pin-money : And further, “ that the said sum of 200*l.* sterling is to be secured to “ the said Mrs. Ismene Magdalena Glendonwyn Scott “ in like manner, by the principal sum of 4,000*l.* sterling “ being retained out of the said sum of 30,000*l.* sterling ;

NAPIER  
v.  
GLENDONWYN  
and others.  
—  
13th Apr. 1835.

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<sup>1</sup> He had previously sold to Mr. Scott the estate of Crogo at the price of 12,000*l.* ; but the question at issue arose out of the sale of Parton.

NAPIER  
v.  
GLENDONWYN  
and others.

13th Apr, 1835.

“ and the said sum of 4,000*l.* sterling shall be the abso-  
“ lute property of the said Mrs. Ismene Magdalena  
“ Glendonwyn Scott, and which she shall have the  
“ power of conveying and settling at her pleasure, to  
“ take effect after her death ; declaring always, that the  
“ disposition to be granted by the said William Glen-  
“ donwyn, of his lands and estates in the parish of Par-  
“ ton, shall be specially burdened with the payment  
“ of the foresaid price of 60,500*l.* sterling, and all  
“ interest to become due thereon, payable in manner  
“ before stipulated, and the same shall remain a real  
“ lien and nexus over the said lands and estates, and  
“ preferable to all other debts and deeds.”

Mr. Glendonwyn died soon thereafter, and in the month of September 1811 his three daughters as heirs portioners executed a disposition in favour of Mr. Scott in terms of the minute of sale ; and which contained this declaration : “ But declaring always, as it is hereby ex-  
“ pressly provided and declared, that the whole foresaid  
“ lands, lying in the parish of Parton, and before dis-  
“ posed, are so disposed under the express burden of  
“ the said sum of 60,500*l.*, being the purchase money  
“ of the said lands and estates, with interest of the said  
“ sum from and since the said term of Whitsunday 1810,  
“ and in time coming ; but always subject to such other  
“ arrangements as shall be made thereanent by the said  
“ Lords of Council and Session, under the reservation  
“ of the foresaid decree, owing to the said William  
“ Scott having been kept out of the possession in manner  
“ foresaid ; and which sum of 60,500*l.* sterling, and  
“ interest to become due thereon, shall be, and is ex-  
“ pressly declared to be, a real burden affecting the  
“ whole subjects before disposed ; and which burden is



“ hereby appointed to be engrossed in the infeftments  
 “ to follow hereon, and in all the future transmissions  
 “ and investitures of the said lands, under this express  
 “ condition, that those infeftments in which this burden  
 “ shall be omitted shall be void and null, and which  
 “ condition shall remain in force until the said price  
 “ shall be paid up.” In virtue of this disposition,  
 Mr. Scott was duly infeft in the same month.

NAPIER  
 v.  
 GLENDONWYN  
 and others.  
 —  
 18th Apr. 1835.

A question having arisen between the three daughters  
 as to the right to that portion of the price which, after  
 deduction of the special sums otherwise allotted, was  
 payable to Mr. Glendonwyn's heirs and assignees, it  
 was decided that it belonged to each of the daughters  
 equally.

Mr. Scott became indebted to the appellant John  
 Napier esq., of Mollance, in the sum of 15,000*l.*, and  
 granted to him on the 14th of November 1812, an heri-  
 table bond and disposition in security over the estates of  
 Parton and Crogo for payment of that sum, and on which  
 Mr. Napier was duly infeft. On the 19th of the same  
 month Mrs. Scott, with the consent of her husband,  
 executed in favour of Mr. Napier a deed which pro-  
 ceeded on the narrative of her right to one third of the  
 residue of the price, and set forth:—“ considering that  
 “ John Napier esq., of Mollance, manager for the  
 “ Galloway banking company at Castle-Douglas, has,  
 “ at the request of me the said Ismene Magdalena Glen-  
 “ donwyn otherwise Scott, and on the faith of my  
 “ granting these presents, advanced and lent to the said  
 “ William Scott, my husband, the sum of 15,000*l.*  
 “ sterling, all in terms of and in conformity to a bond  
 “ and disposition under reversion, granted by him in  
 “ favour of the said John Napier, dated the 14th day of

NAPIER  
 v.  
 GLENDONWYN  
 and others.

19th Apr. 1835.

“ November current, over the whole lands, teinds, and  
 “ others before described ; and in further security and  
 “ more sure payment for which I promised and engaged,  
 “ as an heritable creditor, in terms before recited, not  
 “ only to declare my one third share or portion of the  
 “ foresaid sums of 60,500*l.* sterling, and 12,000*l.* ster-  
 “ ling, to be a postponed debt, and a second or after  
 “ security to his said bond of 15,000*l.*, interest, and  
 “ penalties, as contained in the said bond and disposition  
 “ under reversion granted by my said husband, of the  
 “ date foresaid, but also as a collateral and additional  
 “ security to dispo<sup>n</sup>e, assign, and convey to the said  
 “ John Napier, and his foresaids, my aforesaid one third  
 “ share or portion of the foresaid sums of money, and  
 “ interest thereof, heritably secured as aforesaid, all in  
 “ terms and to the effect underwritten : therefore wit ye  
 “ me, the said Mrs. Ismene Magdalena Glendonwyn  
 “ otherwise Scott (with consent aforesaid) as an herita-  
 “ ble creditor over the lands, teinds, and others foresaid,  
 “ for one third share or portion of the foresaid sums of  
 “ 60,500*l.* and 12,000*l.* sterling, all as before specified,  
 “ to have acknowledged, confessed, and declared, as I  
 “ hereby acknowledge, confess, and declare, that the  
 “ aforesaid sum of 15,000*l.* sterling, interest, and penal-  
 “ ties, contained in the bond and disposition under  
 “ reversion, granted by the said William Scott my hus-  
 “ band in favour of the said John Napier, of the date  
 “ foresaid, shall, in all competitions with himself only, be  
 “ held, admitted, and considered by me, my heirs, exe-  
 “ cutors, and successors, as a prior and preferable debt  
 “ and security to my aforesaid one third share or portion  
 “ of the foresaid sums of 60,500*l.* and 12,000*l.* sterling,  
 “ and interest due and to become due thereon ; and he

“ the said John Napier shall rank primo loco as a  
 “ preferable creditor to me accordingly : And moreover  
 “ wit ye me, with consent foresaid (for the causes fore-  
 “ said), to have dispoed, alienated, and conveyed, as I  
 “ hereby dispone, alienate, and convey to and in favour  
 “ of the said John Napier, his heirs and assignees what-  
 “ soever, not only my aforesaid one third share or portion  
 “ of the aforesaid sums of 60,500*l.* and 12,000*l.*, and all  
 “ interest due and to become due thereon ; and the fur-  
 “ ther sum of 4,000*l.* sterling of preference secured to  
 “ me out of the price of the said estates of Parton  
 “ and Crogo, over and above my said one third share  
 “ or portion of the capital sums before specified, and  
 “ interest thereof, payable furth of all and whole the  
 “ foresaid lands and barony of Parton, comprehending,”  
 &c. “ And I hereby make, constitute, and ordain  
 “ the said John Napier, and his heirs and donators,  
 “ my lawful cessioners and assignees, not only in and to  
 “ my aforesaid one third share or portion of the foresaid  
 “ sums of 60,500*l.* and 12,000*l.* sterling, and all interest  
 “ due and to become due thereon ; as also my aforesaid  
 “ sum of 4,000*l.* sterling of preference, and interest  
 “ thereof, secured to me as aforesaid, all heritably se-  
 “ cured, and declared to be a real burden and nexus  
 “ affecting the lands, teinds, and others before described,  
 “ all as specified and contained in the foresaid dispo-  
 “ sition in favour of the said William Scott, and in-  
 “ strument of sasine following thereon, whole tenor  
 “ and contents thereof, in so far as the same are  
 “ granted and conceived, or can be construed or in-  
 “ terpreted in my favour, and all diligence, action,  
 “ instance, and execution competent to me or my  
 “ heirs for recovery of the same, or any part thereof;

NAPIER  
 v.  
 GLENDONWYN  
 and others.  
 —  
 19th Apr. 1895.

NAPIER  
v.  
GLENDONWYN  
and others.

13th Apr. 1835.

“ but also in and to the aforesaid disposition first  
 “ above recited in favour of the said William Scott,  
 “ and the instrument of sasine following thereon them-  
 “ selves, in so far as I have right and interest therein as  
 “ aforesaid: Surrogating and substituting the said John  
 “ Napier in my full right, title, and place of the pre-  
 “ mises, with full power to him and his foresaids to  
 “ sue for, recover, and discharge my foresaid one third  
 “ share or portion of the foresaid sums of 60,500*l.*  
 “ sterling and 12,000*l.* sterling, and all interest due  
 “ and to become due thereon; as also my foresaid  
 “ sum of 4,000*l.* sterling of preference, and interest  
 “ thereof, secured to me as aforesaid; and generally  
 “ to do every other thing thereanent that I could have  
 “ done myself before granting these presents; declaring  
 “ always, that the said John Napier, on his recovering  
 “ payment from the said William Scott of the foresaid  
 “ sum of 15,000*l.* sterling, interest, and penalties, con-  
 “ tained in the bond and disposition under reversion  
 “ before mentioned, shall be bound to retrocess me and  
 “ my foresaids in the full right and title of my said one  
 “ third share or portion of the sums of money, and  
 “ interest thereof above assigned; and the said sum of  
 “ 4,000*l.* sterling, and interest thereof, of preference  
 “ secured to me as aforesaid, all as contained in the dis-  
 “ position in favour of the said William Scott first above  
 “ recited.” The deed also contained a clause of abso-  
 lute warrandice, and an acknowledgment by Mr. Scott  
 that his subscribing it should be equivalent to lawful  
 intimation.

In the month of January 1813 Mr. Scott granted  
 another heritable bond and disposition in security for  
 10,000*l.* in favour of Mr. Napier over the same

estates; and Mrs. Scott granted a relative deed in similar terms to the one which she had previously executed.

NAPIER  
v.  
GLENDONWYN  
and others.

13th Apr. 1835.

Mr. Scott having thereafter become bankrupt, an action of ranking and sale of his estates was in the year 1817 brought before the Court of Session, in the course of which the estate of Parton was sold at a price which, after deducting the provisions specially appropriated in the original minute of sale, left a deficiency to pay the full amount of the shares respectively due to the three heirs portioners.

In this process various claims were entered; in particular, 1. A claim was made by the children to be preferred to the sum of 10,000*l.* mentioned in the minute of sale.

2. Mrs. Scott claimed to be preferred on the death of her husband to the interest of that 10,000*l.*, to the sum of 4,000*l.* as in her own exclusive right, and to one third share of the residue as one of the heirs portioners. Mr. Napier as a rider on her interest made a similar claim, except as to the interest of the 10,000*l.*, this sum not being conveyed to him by the deeds which had been executed by Mr. and Mrs. Scott.

3. Lady Gordon and Miss Glendonwyn each claimed one third part of the residue of the price as two of the heirs portioners; and they also eventually claimed to be preferred to the interest of the 10,000*l.* and of the 4,000*l.*, and the interest of Mrs. Scott's share during her husband's life as an heir portioner, to the effect of receiving full payment of their respective shares of the residue of the price.

In regard to the 10,000*l.* the Court, on the 24th of June 1825 pronounced this interlocutor: "Find, that the

NAPIER  
v.  
GLENDONWYN  
and others.

—  
13th Apr. 1835.

“ fee of the sum of 10,000*l.* provided by the late Wil-  
“ liam Glendonwyn esq., in the instrument mentioned  
“ in process, dated 22d of April 1809, belongs to  
“ William Glendonwyn Scott and the other children  
“ of the said William Scott and Ismene Magdalena  
“ Glendonwyn his spouse: Find, that John Napier has  
“ no right to the said sum, and repel his claim thereto;  
“ sustain the objection made by the said William Glen-  
“ donwyn Scott, and the other children, and their tutor  
“ ad litem, to the ranking proposed by the common  
“ agent; and find they are entitled to be ranked upon  
“ the fund in medio, preferably to the heirs portioners  
“ of the said deceased William Glendonwyn, and those  
“ deriving right from them, for the said principal sum  
“ of 10,000*l.* payable at the death of the last survivor  
“ of their said parents, with the lawful interest thereof  
“ during the not-payment, and ordain them to be  
“ ranked accordingly; and decern: Repel the objec-  
“ tions made by the said Alexander Crombie to the  
“ ranking of the said Ismene Magdalena Glendonwyn  
“ for the sum of 4,000*l.* sterling, and 200*l.* per annum of  
“ interest thereon, as proposed by the common agent,  
“ reserving all questions between her and the said  
“ John Napier, relative to these and other sums, and  
“ decern.”

This interlocutor was affirmed by the House of Lords on the 14th of May 1827<sup>1</sup>; thereafter, on the 7th of July, Lord Newton pronounced this interlocutor:—“ Ranks  
“ and prefers Mrs. Ismene Magdalena Glendonwyn  
“ alias Scott, spouse of the common debtor, in virtue of  
“ her interest produced, subject to the reservation after

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<sup>1</sup> 2 W. & S. 550.

“ mentioned, for payment of the interest due on the  
 “ sum of 4,000*l.*, and in time coming during her life ;  
 “ and for the said principal sum of 4,000*l.* itself, to  
 “ be disposed of by her at her pleasure, to take effect at  
 “ her death, the said interest to be calculated at the  
 “ rate of 4½ per cent. from the 26th day of May to  
 “ the 18th day of June 1810 years, and thereafter  
 “ at the rate of 5 per cent. ; reserving all questions  
 “ between the said Mrs. Ismene Magdalena Scott and  
 “ the said John Napier, relative to these and other  
 “ sums : And in terms of the foresaid judgment, ranks  
 “ and prefers the said William Glendonwyn Scott, and  
 “ any other child or children of the marriage between  
 “ the said William Scott and Mrs. Ismene Magdalena  
 “ Scott, for payment to them of the sum of 10,000*l.*,  
 “ provided by the late William Glendonwyn esq. in  
 “ the instrument mentioned in process, dated the 26th  
 “ day of April 1809, payable at the death of the last  
 “ survivor of their said parents, with the lawful interest  
 “ during the not-payment, tertio loco, out of the price  
 “ of the said lands : And with regard to the interest of  
 “ the said principal sum of 10,000*l.* from the day of the  
 “ death of the said William Glendonwyn to the term of  
 “ payment before mentioned, ranks and prefers the  
 “ party who shall be found to have right thereto also  
 “ tertio loco, upon the said price, but reserves to the  
 “ division all questions regarding the right to the said  
 “ interest.”

NAPIER  
 v.  
 GLENDONWYN  
 and others.  
 —  
 18th Apr. 1835.

A remit was also made to an accountant to prepare  
 a scheme of division, and objections being made,  
 Lord Newton, on the 11th of July 1829, pronounced  
 this interlocutor : — “ Repels the objections to that  
 “ part of the report which assigns to the heirs por-

NAPIER  
v.  
GLENDONWYN  
and others.

13th Apr. 1835.

“ tioners of the late Mr. Glendonwyn the interest due,  
“ or which may become due, during Mr. Scott’s life, on  
“ the sum of 10,000*l.*, belonging in fee to his children  
“ by Mrs. Scott: Finds, that as the right of the heirs  
“ portioners to this interest arises from the failure of  
“ Mr. Scott to pay them the stipulated price, which is  
“ declared a real burden on the lands, the interest, as  
“ coming in place of the price, must be held to be real  
“ in their persons, so that Mrs. Scott’s share of the same  
“ does not fall under her husband’s *jus mariti*; there-  
“ fore repels the claim of Mr. Crombie and Miss Glen-  
“ donwyn to Mrs. Scott’s share of the said interest;  
“ sustains the objection to that part of the report which  
“ proposes that one third part of the said principal sum  
“ of 10,000*l.*, to be paid to Mr. Crombie, be retained  
“ by him during Mr. Scott’s life; and finds, that as  
“ this sum must continue in the meantime to be a real  
“ burden on the lands, Mr. Napier and Miss Glendon-  
“ wyn are entitled to retain the respective proportions  
“ allocated to their prices, on granting heritable bonds  
“ in security of the same; the bond by Mr. Napier to  
“ be for payment to the children, at the death of the  
“ longest liver of Mr. and Mrs. Scott, of the principal  
“ sum of 6,666*l.* 13*s.* 4*d.*, and for payment, during  
“ Mr. Scott’s life, of one moiety of the interest to  
“ Mr. Crombie, as assignee to Lady Gordon, and of  
“ the other moiety to Mrs. Scott or her assignees: and  
“ in the event of Mrs. Scott surviving her husband, for  
“ payment to her or her assignees of the whole interest  
“ of the said principal sum from the time of Mrs. Scott’s  
“ death till the termination of her liferent; and the  
“ bond by Miss Glendonwyn to be for payment to the  
“ children, at the death of the longest liver of Mr. and



“ Mrs. Scott, of the principal sum of 3,333*l.* 6*s.* 8*d.*  
 “ and for payment of interest only for the time subse-  
 “ quent to Mr. Scott’s death, which interest, if  
 “ Mrs. Scott survive him, shall be payable to her or  
 “ her assignees so long as she lives; reserving con-  
 “ sideration of the new claim made by Mr. Crombie  
 “ to the interest of the sum falling to Mrs. Scott as  
 “ heir portioner, till the issue of the question be-  
 “ twixt her and Mr. Napier as to the validity of his  
 “ assignation.

NAPIER  
 v.  
 GLENDONWYN  
 and others.  
 —  
 13th Apr. 1835.

“ Note.—The Lord Ordinary has reserved consider-  
 “ ation of the claim of the interest of Mrs. Scott’s share  
 “ as an heir portioner, because it appears to him, that,  
 “ unless she shall succeed in reducing her assignation  
 “ to Mr. Napier, he, as having right to the principal  
 “ sum under this assignation, will have right also to the  
 “ interest, so that the latter will not fall under  
 “ Mr. Scott’s *jus mariti*, the sole foundation of  
 “ Mr. Crombie’s claim to it.”

Miss Glendonwyn and Mr. Crombie (as in right of Lady Gordon) having reclaimed, the Court, on the 26th of January 1830. recalled “ that part of the Lord  
 “ Ordinary’s interlocutor complained of; and find that  
 “ Mr. Crombie and Miss Glendonwyn are entitled to  
 “ the whole interest of the sum of 10,000*l.* sterling, which  
 “ has accrued or may accrue during the life of Mr. William  
 “ Scott; and that neither Mrs. Scott, nor her disponee  
 “ Mr. Napier, are entitled, during the life of the said Wil-  
 “ liam Scott, to draw any part thereof, until the debts of  
 “ the petitioners are paid.” This judgment was affirmed  
 by the House of Lords on the 3d of October 1831.<sup>1</sup>

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<sup>1</sup> Napier v. Gordon, 5 W. & S. 745.

NAPIER  
v.  
GLENDONWYN  
and others.

19th Apr. 1835.

Miss Glendonwyn and Mr. Crombie then insisted that they were entitled to draw the interest of Mrs. Scott's third share of the price during the life of Mr. Scott, to the effect of operating full payment of their respective shares as heirs portioners. This they did on the ground that the interest belonged to Mr. Scott *jure mariti*, and that he could not draw any part of it till the debt due by him to them was fully liquidated. Mr. Napier resisted this motion<sup>1</sup>, in respect that the *jus mariti* did not apply to interest which had not become payable, and that Mrs. Scott having transferred to him her share of the price with the interest thereon he could not be affected by any claim which the other two heirs portioners might have against Mr. Scott; besides, Mrs. Scott, as an heir portioner, was as much entitled to be indemnified for any loss arising on her share as her two sisters. The Court, on advising cases and minutes, pronounced on the 12th of June 1833 this interlocutor<sup>2</sup>:  
 “ Find that Miss Glendonwyn and Lady Gordon are  
 “ entitled to the whole interest of the reversion of the  
 “ fund in medio, set apart or to be set apart in the  
 “ division, as the share falling to Mrs. Scott as one of  
 “ the three heirs portioners of her father, which has  
 “ accrued or may accrue during the life of Mr. William  
 “ Scott: and that Mr. Napier, as disponee of Mrs. Scott,  
 “ is not entitled, during the life of Mr. Scott, to draw  
 “ any part of the said interest till the debt due by  
 “ Mr. Scott to Miss Glendonwyn and Lady Gordon

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<sup>1</sup> Mrs. Scott had in the meanwhile withdrawn from the discussion, having entered into a transaction with Mr. Napier, under which she abandoned all challenge of the deeds which she had granted to him.

<sup>2</sup> 11 S., D., & B., 707.

“ shall be paid: Find Mr. Napier liable to Miss Glen-  
 “ donwyn and Lady Gordon in the expence of this part  
 “ of the discussion.”

NAPIER  
 v.  
 GLENDONWYN  
 and others.

19th Apr. 1835.

Napier appealed.

*Appellant.*—1. The judgment proceeds on an erroneous conception, and application of the law with regard to the rights of a husband over the property of his wife. A husband has no right to the heritable property which belongs to his wife, and in the present case it is admitted that the share of the price due to Mrs. Scott is of that nature. He has merely a right to that which is either actually moveable or in law regarded as such. He is entitled *jure mariti* to the rents of his wife's estates, or the interest of her heritable funds, when they are actually due and payable; but he has no such right to the future rents, or to interests, which are not yet payable. The wife may sell her estate, and her disposition will effectually vest the future rents in the purchaser. In consenting to such a disposition the husband does not do so on the footing that he has right to the rents, but merely as her guardian or administrator in law. He is a mere consenter, not exercising any act of disposition or assignation.<sup>1</sup> In like manner the wife is entitled to assign any heritable funds which belong to her, and the interest thereof which shall subsequently arise will belong to the assignee and not to the husband.<sup>2</sup> In the present case Mrs. Scott had undoubtedly right to one third share of the price, and the interest to arise thereon; this she transferred to the appellant, and consequently all the future interests

<sup>1</sup> 1 Ersk. 6. 12. & 13; 1 Bell, 61.

<sup>2</sup> 1 Bankton, 582.

NAPIER  
v.  
GLENDONWYN  
and others.  
—  
13th Apr. 1835.

became vested in his person. But the Court have proceeded on the footing that the interest belonged and will belong to Mr. Scott during all the days of his life; and on that erroneous principle they have held that the other two heirs portioners are entitled to be preferred to that interest in the same way as if the appellant were claiming in right of Mr. Scott. But his claim is not made through Mr. Scott; it is founded on the assignation granted by Mrs. Scott, and which was intimated to Mr. Scott. The previous judgment as to the interest of the 10,000*l.* is not applicable to the present question, because neither that sum nor the interest of it were conveyed to the appellant.

2. But, in the next place, it is contrary to equity not to give to Mrs. Scott as an heir portioner the same equitable benefit which has been adjudged to her two sisters and heirs portioners. It is assumed that there is a deficiency arising on the shares of the price payable to each of them, and it is not apparent on what ground the two sisters should be found entitled to draw full payment of their respective shares, and that Mrs. Scott should not receive the same measure of justice.

*Respondents.*—1. It is necessary to attend to the peculiar position in which Mr. and Mrs. Scott stood, in whose rights the appellant makes his claim. Mr. Scott was indebted in the sum of 60,500*l.* and the interest arising thereon; and both the principal sum and interest were heritably secured over the estate. To the interest arising on one third part he had right jure mariti; but in a question with the respondents he would not, so long as their shares of the price were not fully paid, draw any part of the interest. His want of right to do

so formed an important part of the respondents' security; and if he could not draw the interest directly he could not by any act or deed defeat this security by concurring with his wife in transferring the interest either to a third party for his own behoof or for a valuable consideration paid to him. Such a transfer could not affect the security which the respondents previously had in virtue of the real burden on the estate. If no such security had previously existed, then the claim of the appellant might have been well founded. But, in the case as it actually stands, there was a pre-existing claim to the interest, founded in and arising out of Mr. Scott's title. If, for example, a husband granted a security to a creditor by assigning to him the rents payable out of his wife's estate, and a party subsequently got a conveyance of the estate from the wife, he can only take it subject to the security which had been granted in favour of the creditor. In point of principle the case in question is precisely the same. Accordingly, the previous judgments relative to the 10,000*l.* and the 4,000*l.* are founded upon that principle. Mr. Scott had right, both as disponent and jure mariti, to the interest of these sums, and although the appellant contended that he was entitled to them, at all events to the interest of the 4,000*l.*, yet that plea was repelled, and the interest of both sums was found to belong to the respondents.

2. If the respondents be correct in the preceding argument, it is obvious that it disposes of the second plea maintained by the appellant. If no deed had ever been executed by Mr. and Mrs. Scott, and if she had been claiming right to the interests, the answer would have been that they belonged as they fell due to her

NAPIER  
v.  
GLENDONWYN  
and others.  
—  
13th Apr. 1835.

NAPIER  
v.  
GLENDONWYN  
and others.  
—  
19th Apr. 1895.

husband *jure mariti*, and therefore that he alone could be the claimant. But a claim by him could not be sustained in a question with the respondents so long as he remained indebted to them in any part of the price. The interest must therefore be payable exclusively to the respondents.

LORD BROUGHAM:— My Lords, it is unnecessary for me at present to go particularly into this case, as I should wish for time to consider it before your Lordships proceed to adjudication, more particularly because it is represented to involve points of importance. It has been supposed that this question is connected with a case which was three or four years ago decided by your Lordships, and it is necessary to see how far the two cases are so connected. There are other questions into which I do not feel it necessary to enter now. I apprehend that if there were no lien at all upon the interest, it would be competent to a married woman, notwithstanding the *jus mariti*, to part with her estate to a creditor of her husband, or a creditor of her own, or to a stranger, for a valuable consideration, provided it were a *bonâ fide* transaction; and that the consent of the husband would not only enable her to part with the reversionary interest in that estate itself upon the decease of the husband in her lifetime, but also, if it is a personal fund, and falling distinctly within his marital right, to part with the interest during the subsistence of the marriage. But that is not the ground upon which the Court below proceeded. I was a little alarmed when I heard it stated that they had proceeded on the negative of that position. I do not apprehend that either Dr. Lushington or Mr. Wood have put the case at all on such a

ground, but they put it on the ground of the existence of a lien or claim upon the interest, independently of the reversionary right, or the distinction between the reversionary right on the demise of the husband or other termination of the marriage, and the interest during the subsistence of the marriage. My Lords, it may be necessary that the fact should be ascertained before a decision of that question should be made; and I shall look farther into the case before I call upon your Lordships to decide it. I am sorry to say I do not find very great assistance given us in the report of the case in the Court below. I do not mean to say that there is any blame attached upon learned judges for not giving their reasons; their first duty is to see that they do justice between the parties,—that they are right in their decision. Their giving reasons is undoubtedly very useful, especially where the case is carried to a higher Court, because, on the appeal, it prevents any misunderstanding of the grounds on which they have decided; but I repeat, no person has a right to complain if he does not find reasons stated. I have referred to the reports of this case in the Court below; and unfortunately we are left in uncertainty as to the grounds of the decision; because merely affirming that the one party's reasons are wrong or the other's right does not show us in what respect and why they are so. I move your Lordships that the further consideration of this case be adjourned.

My Lords, I have, since the argument, fully considered this case, and I am of opinion that the judgment of the Court below ought to be affirmed, with costs; I do not feel it to be necessary to trouble your Lordships by going into the particulars of the case.

NAPIER  
v.  
GLENDOWYN  
and others.

13th Apr. 1835.

NAPIER  
v.  
GLENDONWYN  
and others.

19h Apr. 1835.

The House of Lords ordered and adjudged, “ That the  
“ said petition and appeal be, and are hereby dismissed  
“ this House ; and that the interlocutor therein complained  
“ of, be, and the same is hereby affirmed : And it is further  
“ ordered, That the appellants do pay or cause to be paid  
“ to the respondents the cost incurred in respect of the said  
“ appeal ; the amount thereof to be certified by the clerk  
“ assistant.”

A. H. MACDOUGALL—JAMES DUTHIE,—Solicitors.



[13th April 1835.]

**RICHARD ALEXANDER OSWALD, Miss DOROTHEA MARY MAXWELL, and her Guardian, WILLIAM CONSTABLE MAXWELL, and their Tenants, Appellants. —**  
*Dr. Lushington—Keay.*

**JAMES M'WHIR, Assignee of George Little,**  
 Respondent.

*Fishing.*—Question, whether stake-nets placed on sand banks adjacent to the river Nith fall under the exception of the statute 1563, c. 68, as to cruives and yairs upon the water of Solway.

*Process — Verdict.*—Circumstances under which a special Case, which was substituted by agreement of parties for a verdict, was insufficient to afford grounds for pronouncing judgment; and a remit made to the Court of Session to cause an issue to be sent to a jury.

**I**N the month of April 1825 George Little, describing himself as infest in certain fishings in the river Nith, in the county of Dumfries, raised a summons before the Court of Session, setting forth, That, in the course of the year 1816, the appellants, as pretended proprietors of fishings in the lower part of the river Nith, took it upon them most illegally to alter the common mode of fishing which had been hitherto practised in that river, and to erect stake-nets and other fixed engines for catching fish within the limits and upon the banks and shores of the river Nith, opposite to their

2D DIVISION.

Ld. Mackenzie.

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

respective lands, whereby great quantities of salmon and other fish were taken, contrary to law, and much injury was thereby sustained by him: that in consequence he presented, in the month of September 1816, to the Court of Session a bill of suspension, complaining of the illegality of this new mode of fishing, and craving an interdict against the Appellants from using such a mode of fishing within the limits of the river Nith, as particularly described in an act of parliament passed in the year 1792, which declares, “ that the limits of the  
“ mouth or entrance of the said river Nith shall for the  
“ future be deemed and taken to be, and extend from  
“ the large house of Carsethorn of Arbigland, in a line  
“ across the river Nith due east:” that Lord Gillies, Ordinary, on the bills, in the meantime granted the interdict, which was intimated to the Appellants and their tenants, who all became satisfied of the illegality of the stake-nets and engines complained of, and of their want of title to disturb the possession, and they accordingly removed the said machinery: that the bill of suspension was ultimately passed, and the letters were expedite and signeted upon the 19th day of February 1817, and the Appellants were prohibited from using such nets within the said limits, in all time coming, and all of them had, for upwards of six years, acquiesced in and homologated the interdict: that in the course of the year 1822 William Constable Maxwell, now of Nithsdale, and Joseph Grier or Grierson, as his tenant, and in 1824 Alexander Oswald, and John Pagan, as his tenant, James Maxwell, and John Ferguson, as his tenant, while the interdict remained unrecalled, took it upon them, in

violation thereof, and in contempt of Court, again to disturb Little's possession, by erecting stake-nets and other illegal engines of similar description with those made use of in 1816, upon the river Nith and on its banks and shores, and within the same limits as those which were declared illegal by the interdict; and that these nets were continued to be used: that though the said persons, pretending to be proprietors, had no legal title to any mode of fishing, and neither they nor their tenants had any title to erect stake-nets or such other engines as they had done upon the river Nith, nor on its banks and shores, where the tide ebbs and flows; and although, by the common law as well as by special acts of parliament, the proprietors of salmon fisheries are not at liberty to exercise the same, or to take salmon in rivers or friths where the tide ebbs and flows, otherwise than by net and coble, or in such other way as is warranted by the titles of the parties, and may have been sanctioned by immemorial usage; yet, these persons had taken upon them to erect upon the Nith, and on its banks and shores, a number of stake-nets and other machinery, not formerly used in that river, opposite to their respective lands, for taking fish, in violation of the different modes of fishing sanctioned by statute and the common law, to the great hurt of Little and others, the under proprietors. He therefore concluded, first, to have it found, that the appellants had "been guilty of contempt of this Court, and a breach of the interdict granted in 1816, by erecting the nets in question, and should be punished by such fines as may seem proper to our said lords, and decerned and ordained

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

“ by decret foresaid to make payment to the pursuer  
“ of such damages as may be ascertained he has suffered  
“ and may suffer in consequence of the foresaid breach  
“ of interdict.” And secondly, that the Appellants had no right by themselves, or others employed or authorized by them, to erect stake-nets or other machinery for catching salmon, not formerly used within the river Nith, either in that river or on the sands and shores adjoining thereto, between high and low water marks; and on it being so found that they should be interdicted from erecting or using in future any stake-net, or other standing and fixed machinery, not warranted by their titles and by law, for the purpose of catching salmon within the limits of the said river Nith, or on its banks and shores, and from molesting the pursuer in the peaceable possession of the said fishings in manner foresaid; as also to make payment to the pursuer of the sum of 1,000*l.* sterling, in name of damages.

In defence the appellants stated, 1st, That the interdict had been granted in absence in the Bill Chamber, and was expressly limited in its operation to the 26th of November 1816; that the letters had never been executed, so that the interdict expired; and that on this footing an application had been made by Little to the sheriff of the county for an interdict, which had been refused, and on an advocacy the Court of Session had adhered, reserving to him to bring an action of declarator<sup>1</sup>; and they therefore pleaded, that

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<sup>1</sup> See Little and Powel v. Grierson, 7 Dec. 1824, 3 S. & D. 261, new edition; 371, old edition.

the conclusions as to the breach of interdict were unfounded: 2d, In regard to the conclusion relative to the right of fishing, they admitted that they had erected stake-nets for fishing salmon at the places alleged, but they averred that these stake-nets were situated where the salt waters of the Solway ebb and flow, and were protected by the saving clause in the act 1563, cap. 68<sup>1</sup>,

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

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<sup>1</sup> That act, as printed from the record in Mr. Thomson's edition of the Acts of Parliament, vol. ii. p. 537, is in these terms: — " The Quenis  
" Maiestie and Thre Estatis of this present Parliament ratifeis and  
" appreuiss the act maid be hir hienes maist nobill gudochir King James  
" the Feird of gude memorie, of the quhilk the tenour followis: Item,  
" it is statute and ordanit that all cruuis and fische dammis that ar within  
" salt watters that ebbis and flowis be allutterlie destroyit and put downe,  
" alsweill they that pertene to our Souerane Lord as vthers throw all the  
" realme: And anent cruuis in fresche watters, that they be maid in sic  
" largenes and sic dayis keipit as is contenit in the actis and statutis maid  
" thairupone of befoir, with this additioun following; that is to say, that  
" all cruuis and zairis that ar set of lait vpone sand and schauldis far  
" within the watter quhair they war not of befoir, that thay be inconti-  
" nent lane downe and put away, and the remanent cruuis that ar set and  
" put vpone the watter sandis to stand still quhill the first day of October  
" nixt to cum, and incontinent efter the said first day to be destroyit and  
" put away for euer; and for execution of this act ordanis euerie erle,  
" lord, barrone, and euerie gentilman landit within his awin boundis,  
" to cause remoue, destroy, put downe, and tak away the saidis cruuis  
" and zairis in maner foirsaid respective vnder the pane of ane hundreth  
" pundis, to be takin vp of thair gudis, that puttis not this act to dew  
" executioun, and the said soume to be imbrocht and applyit to our  
" Souerane Ladyis vse, and that euerie schiref, stewart, baillie, alsweill  
" regaltie as rialtie, thair deputis, and vthers jugeis, within their awin  
" iurisdictionis, tak gude attendance and see that as is contenit in this  
" present act be done and put to executioun in all punctis, according to  
" the tenour of the samin; and failzeing thairof, that euerie schiref,  
" stewart, baillies, alsweill of regalities as rialteis, and vthers jugeis  
" within thair awin iurisdiction as said is, vptak and inbring the said  
" pane of an hundreth pundis of euerie erle, lord, barrone, gentilman  
" landit, or vthers negligent in the premissis, and mak compt thairof  
" zeirlie in the checkar; and gif the saidis schireffis, stewartis, baillies  
" of regalties or rialteis, beis fundin negligent in executioun of thair  
" officis anent this act, that the foirsaid soume be vpliftit of thameselfis  
" and imbrocht to our Souerane Ladyis vse, and that but preiudice of the

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

which provides, that “ this act in noways be extended to  
“ the cruvis and zairs being upon the water of Solway.”  
They also alleged, that stake-nets were the same kind  
of machinery as yairs, and had been so adjudged in  
the case of the Duke of Atholl, 7th March 1812,  
relative to fishings in the Tay.

After a record was closed, the respondent, James  
M'Whir, who had purchased the fishings from Mr. Little,  
was sisted as pursuer of the action in place of Little.

An issue was then sent to a jury, which, (after  
an admission that Mr. M'Whir was proprietor of the  
salmon fishings in the river Nith set forth in the sum-  
mons,) was in these terms:—“ Whether, during the  
“ years 1822 and 1824, or either of them, in the river  
“ Nith, or on the sands and shaulds within the bounds  
“ thereof, where the water ebbs and flows, the defender,  
“ Richard Alexander Oswald, or John Pagan of Little-  
“ bar, his tenant, wrongfully erected, or caused to be  
“ erected, or from 1822 to April 1825, or during any  
“ part of the said period, wrongfully used or caused to  
“ be used, for the purpose of catching salmon, certain  
“ stake-nets or other fixed engines, to the loss, injury,  
“ and damage of the pursuer?” Similar issues, appli-  
cable to the other appellants, were sent for trial at the  
same time, and the damages were laid at 1,000*l*.

The case came on for trial before Lord Gillies and a jury  
at the Circuit Court held at Dumfries in April 1830.  
It was stated by the appellants, that after the jury was

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“ panis to be execute vpon the foirsaidis erle, lord, barron, gentilman,  
“ or vther contrauenaris of the foirsaid act ; prouyding alwayis, that this  
“ act on na wayis be extendit to the cruuis and zaris vpon the watter of  
“ Sulway.”

empannelled, and before the counsel for the respondent had advanced many sentences in opening his case, he was interrupted by a suggestion from Lord Gillies, that as the issues seemed to involve more of law than of fact, he thought it desirable that the jury should be discharged without finding a verdict, and that the parties should endeavour to adjust a statement of facts, upon which ultimate judgment in the cause might be pronounced; coming from such a quarter, this suggestion was, as a matter of course, acceded to; and a juror having been withdrawn, a special Case was prepared and agreed upon by the parties. That Case, after reciting the issues, proceeded in these terms:—

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

“ Afterwards, to wit, at Dumfries, the 6th day of  
“ April 1830, before the Right Honourable Adam  
“ Gillies, one of the Lords Commissioners of the Jury  
“ Court in civil causes, compeared the said pursuer and  
“ the said defenders by their respective counsel and  
“ agents, and a jury were empannelled and sworn to try  
“ the said issues between the said parties; but by the  
“ agreement of the said parties the said jury were dis-  
“ charged without finding a verdict, the parties having  
“ agreed that the judgment in the cause shall be pro-  
“ nounced upon the following statement of facts:—

“ 1. That the defenders did, during the years men-  
“ tioned in the issues, use stake-nets of a construction  
“ and in situations which, but for the exception as to the  
“ water of Solway contained in the act 1563, cap. 68,  
“ would be illegal.

“ 2. That the river Nith falls into the Solway Frith,  
“ and that these nets are placed above the point at  
“ which the fresh water of the river Nith joins the Sol

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

“ way Frith at low water, and are within the bounds of  
“ the river Nith.

“ 3. That these nets are not placed in the fresh water  
“ of the Nith, but on sands or shaulds adjoining thereto,  
“ which sands and shaulds, and the said nets thereon,  
“ are covered by the tide when it flows, but are left dry  
“ when it ebbs.

“ The question for the decision of the Court on the  
“ above stated facts shall be—

“ Whether the nets are protected by the exception in  
“ favour of the water of Solway, contained in the said  
“ act?

“ If it shall be the opinion of the Court that the ex-  
“ ception does apply to stake-nets in the above situation,  
“ then judgment shall be pronounced against the pur-  
“ suer, and in favour of the defenders, with expences.  
“ If the Court shall be of opinion that the exception  
“ does not protect the above nets, then judgment shall .  
“ be pronounced in favour of the pursuer, with expences,  
“ against all the defenders, finding each of them liable  
“ in one shilling of damages, ordaining them to remove  
“ their present nets, and prohibiting them from using  
“ any fixed engines, either in the present situation of  
“ these nets, or within a line drawn from a point on the  
“ Carlaverock side, equidistant from Carlaverock castle  
“ and Blackshaw point; which line, so drawn from this  
“ point, shall run due south till it meet low-water mark  
“ at stream tides, and from thence to follow the line of  
“ low-water mark till it meets a line drawn from  
“ Southernness due east.

“ It being understood that, if the fresh water stream  
“ of the Nith shall ever change, so as to cross the fore-



“ said line running due south, this arrangement shall  
 “ not apply to that part of the stream which shall so  
 “ cross the said line.

OSWALD  
 and others  
 v.  
 M'WHIR.

13th Apr. 1835.

(Signed) “ JOHN HOPE for pursuer.

“ H. COCKBURN for defenders.”

When the Case was laid before the Lord Ordinary, he appointed the parties to argue the questions arising out of it.

On the part of the respondent it was maintained that, as the appellants admitted that their nets “ are placed  
 “ above the point at which the fresh water of the river  
 “ Nith joins the Solway Frith at low water, and are  
 “ within the bounds of the river Nith,” it was impossible for them to maintain that they fell within the exception of the statute, which was confined to “ cruvis  
 “ and zairs being upon the water of Solway ;” and it was of no importance that the respondent had admitted  
 “ that these nets are not placed in the fresh water of  
 “ the Nith, but on sands or schaulds adjoining thereto,  
 “ which sands and schaulds, and the said nets thereon,  
 “ are covered by the tide when it flows, but are left  
 “ dry when it ebbs.” Neither was it competent or relevant for the appellants to allege that the river Nith formed part of or was situated within the water of Solway, there being no such fact stated in the special Case, which must be regarded as a verdict. By the expression “ water of Solway” in the statute was not meant that arm of the sea which is known by the name of the Frith of Solway, but that part which formed the boundary between England and Scotland,—the purpose of the exception having been, that as Englishmen might on their side of the water fish at all periods

OSWALD  
and others  
v.  
M'WHIR.

19th Apr. 1835.

of the year, so Scotchmen should not be prevented from enjoying the same advantage.

The appellants, on the other hand, contended that the expression "water" comprehended not merely rivers, but estuaries — such as the Frith of Forth, and that accordingly in the case of the Duke of Atholl it had been expressly decided that the Frith of Tay fell within that general term; and, in the opinions which were then delivered, the Frith of Solway had been referred to in confirmation of the argument, as it was generally denominated the "water" of Solway. The provision of the statute, therefore, could not be confined within the narrow bounds contended for by the respondent; it embraced and applied to all the waters of the Solway, including the rivers which flow into it, in so far as the salt waters of the Solway enter into them at the flowing of the tide. On this footing, the House of Lords in the case of *Murray v. Earl of Selkirk*, relative to stake-nets on the river Dee, which flows into the Solway Frith, made a remit to inquire whether they were not within the water of Solway, and so within the exception of the statute.<sup>1</sup> Now it was admitted in the special Case, that although the nets were placed at a point above that at which the water of the Nith joined the Solway Frith at low water, yet they were not placed in the fresh water of the Nith, but on sands or schaulds adjoining thereto, which are covered by the tide when it flows, and are left dry when it ebbs. The tide here alluded to is the water of the Solway, and consequently it is necessarily admitted that the nets, although within the bounds

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<sup>1</sup> 2 Shaw's App. Ca. 299.

of the river Nith, are also within the waters of the Solway.

OSWALD  
and others

v.  
M'WHIR.

13th Apr. 1835.

Lord Mackenzie pronounced, on the 24th of May 1831, this interlocutor: — “ Finds, that the exception in the  
“ act of parliament 1563, cap. 68, respecting the water  
“ of Solway, does not protect stake-nets, placed in the  
“ situations in which it is admitted that the stake-nets of  
“ the defenders were placed during the years 1822 and  
“ 1824; and therefore repels the defences, and finds each  
“ of the defenders liable to the pursuer in one shilling  
“ of damages, and ordains them to remove their present  
“ nets, and prohibits them from using any fixed engines,  
“ either in the present situations of these nets, or within  
“ a line drawn from a point on the Carlaverock side,  
“ equidistant from Carlaverock Castle and Blackshaw  
“ Point, which line, so drawn from this point, shall  
“ run due south, till it meets the low-water mark at  
“ stream-tides, and from thence to follow the line of  
“ low-water mark, till it meets a line drawn from  
“ Southernness due east; it being declared, that if the  
“ fresh water stream of the Nith shall ever change, so  
“ as to cross the foresaid line running due south, this  
“ decret shall not apply to that part of the stream  
“ which shall so cross the said line, and decerns and  
“ declares accordingly: Finds the defenders liable to  
“ the pursuer in expences.”

The appellants having reclaimed, the Court, on the 8th of July issued this order: — “ The Lords,  
“ before answer, in respect of the case depending in the  
“ First Division of the Court, relative to the stake-net  
“ fishings on the Dee, and the remit from the House of  
“ Lords in the appeal thereanent, direct this note to be  
“ laid before the judges of that Division, and the per-

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

“ manent Lords Ordinary, and desire their opinion in  
“ writing on the question, whether the fishings here  
“ in question are situate within the protection of the  
“ statute founded on? and appoint the parties to give  
“ in minutes relative to the application of the proceed-  
“ ings in the Dee case, to the case here in dispute.”  
This having been done, the consulted judges returned  
the following opinions: —

*Lord President and Lord Gillies.* — “ We have been  
“ diffculted in this case by the terms in which the  
“ statement of facts is drawn up.

“ The second fact stated is, ‘ that the river Nith falls  
“ ‘ into the Solway Frith, and that these nets are placed  
“ ‘ above the point at which the fresh water of the river  
“ ‘ Nith joins the Solway Frith at low water, and are  
“ ‘ within the bounds of the river Nith.’

“ The third fact stated is, ‘ that these nets are not  
“ ‘ placed in the fresh water of the Nith, but on sands  
“ ‘ or shaulds adjoining thereto, which sands or shaulds,  
“ ‘ and the said nets thereon, are covered by the tide  
“ ‘ when it flows, but are left dry when it ebbs.’

“ Now, there seems to be both contradiction and  
“ obscurity in these two statements.

“ In the second, the nets are decidedly stated to be  
“ placed ‘ within the bounds of the river Nith,’ and yet  
“ in the third statement they are said ‘ not to be placed  
“ ‘ within the fresh water of the river Nith.’

“ Now, as a river, in contradistinction to the sea, or  
“ an arm or bay of the sea, can consist only of fresh  
“ water, it is not easy to understand how nets, or  
“ any thing else, can be said to be within the bounds  
“ of the river, and yet not in the fresh water of that  
“ river.

“ Secondly, there seems to be considerable obscurity  
 “ in the third statement, where it is said that the nets  
 “ ‘ are covered by the tide when it flows, but are left  
 “ ‘ dry when it ebbs.’

OSWALD  
 and others  
 v.  
 M'WHIR.  
 —  
 13th Apr. 1835.

“ Now, in flowing into the mouth of a river, the tide  
 “ is in several different situations. At first, the tide is  
 “ composed entirely of the salt water of the sea. Far-  
 “ ther up it mixes with the fresh water of the river, and  
 “ the water is brackish. Still farther up, the effect of  
 “ the tide is merely to dam up and repel the fresh  
 “ water, and the water is entirely fresh.

“ Now, it is not stated in which of these ways the  
 “ tide covers those nets.

“ We confess, therefore, that we do not think that  
 “ the statement of facts is calculated to procure a very  
 “ decided opinion. But, holding the second statement  
 “ to be the leading one, as it is certainly the most clear  
 “ and explicit, we are of opinion that the interlocutor  
 “ of the Lord Ordinary is well founded.”

*Lord Corehouse.* — “ I concur in this opinion. The  
 “ special verdict is not clear, and not perhaps con-  
 “ sistent ; but the finding, ‘ that the nets are within the  
 “ ‘ bounds of the river Nith,’ appears to me decisive in  
 “ favour of the Lord Ordinary’s interlocutor. If it  
 “ had not been for that finding, I should have thought  
 “ it competent to inquire whether they are placed on  
 “ the proper shore of the Nith, or in an inland bay of  
 “ the Solway, through which, at low water, the Nith  
 “ flows. If it turn out that the spot where they are  
 “ would be covered by the sea at high water, though  
 “ the Nith were to cease to flow, I should think that  
 “ the exception of the statute applied to them, for,

OSWALD  
and others  
v.  
M'WHIR.

—  
13th Apr. 1835.

“ under the denomination of the water of Solway, the  
“ bays of the Solway must be included. But I am not  
“ permitted by the verdict to go into that inquiry.”

*Lord Moncreiff.*—“ I concur in the opinion of the  
“ Lord President, with the explanation in that of  
“ Lord Corehouse. But that explanation is necessary  
“ to express the view which I have of the case, and of  
“ the legal construction and effect of the statute. It is  
“ only on the ground, that the situation in which the  
“ nets are placed is to be taken as strictly and properly  
“ within the bounds of the river Nith, that I can hold  
“ that the exception of the statute does not apply to it.”

*Lord Craigie.*—“ I regret that, as in other cases of  
“ the same kind, a plan or survey of the different places  
“ and fishing stations referred to in the pleadings has  
“ not been prepared.

“ I also regret that there has been no exhibition of  
“ the title deeds and leases of the lands and fishings,  
“ nor any particular statement as to the practice or  
“ usage in the salmon fishings ex adverso of the Solway,  
“ and said to fall under the enactment in 1563, relating  
“ to ‘cruives and yairs’ being within ‘the water of  
“ ‘Solway.’

“ Lastly, and above all, I regret the inconsistency and  
“ general laxity in the statements given in by the parties,  
“ with the view of obtaining the judgment of the Court,  
“ as if a special verdict had been adjusted. Even as  
“ the cause now stands, however, I entirely concur with  
“ the Lord Ordinary in the cause (Lord Mackenzie),  
“ and also in the opinion of the Lord President, that  
“ the second statement is more complete and applicable  
“ than the third, which rests the defenders’ claim chiefly

“ upon the state of the water where the fishings are  
“ carried on, whether to be called fresh or salt, which  
“ appears to be of no importance.

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

“ By the law of Scotland, the right of fishing in the  
“ deep sea (as it is called), that is, where the water is  
“ salt, even while the tide is out, belongs to the public  
“ at large.

“ But the right of salmon fishing under that limitation  
“ belongs, in Scotland, to the Crown, although the  
“ privilege of fishing in certain places may be alienated  
“ by the Crown, and afterwards become the subject of  
“ commerce : and for preserving the breed of salmon,  
“ and for ensuring the equal exercise of rights of salmon  
“ fishings by those who have obtained grants from the  
“ Crown, various restrictions have been introduced by  
“ the public law, and referring to three different  
“ situations.

“ These are, first, in rivers having no immediate  
“ communication with the sea or tide : Second, where  
“ the river meets and mixes with the tide of the sea :  
“ And, third, in salt water, where the tide ebbs and  
“ flows, or within flood-mark of the sea, and without  
“ immediate intercourse with any river.

“ In the first of these situations, the owners of salmon  
“ fishing are permitted to use what are called cruives  
“ and yairs, if sanctioned by special grants from the  
“ Crown, and duly followed with possession. In the  
“ second, there can be no fishing unless by net and  
“ coble, cruives and yairs and all fixed machinery for  
“ catching salmon being expressly and anxiously pro-  
“ hibited ; and in the third, the prohibition is equally  
“ positive and general, with one very limited exception,

OSWALD  
and others

v.  
M'WHIR.

19th Apr. 1835.

“ on which the defenders' plea is solely founded, with  
“ regard to cruives and yairs being within the water of  
“ Solway.

“ It may be noticed, that the same general prohi-  
“ bition is to be found in other enactments, both before  
“ and after that in 1563; and the whole were printed  
“ together from the records, by the care of the deputy-  
“ register, Thomas Thomson esq., in the case of Tay  
“ fishings, in 1810, and in the subsequent case of the  
“ South Esk fishings, both to be afterwards noticed.

“ Referring to the enactment itself, it will be observed,  
“ 1st, ‘ That all cruives and fish dammis that are within  
“ ‘ salt waters that ebbs and flows are to be uterlie  
“ ‘ destroyed and put doune, alsweil they that perteins  
“ ‘ to our Souverain Lord as others thro' all the realme.’

“ 2d, ‘ And anent cruives in fresche watters, that they  
“ ‘ be made in sic largenes, and sic dayis kepit, as is  
“ ‘ contenit in the actes and statutis maid thairupone of  
“ ‘ befoir, with this addition following; that is to say,  
“ ‘ that all cruives and yairis that are set of lait upone  
“ ‘ sande and schauldis far within the watter quhair  
“ ‘ they war not of befoir, that they be incontinent  
“ ‘ tane doune and put away, and the remanent cruivis  
“ ‘ that are set and put upone the watter sandis to  
“ ‘ stand till quhill the first day of Oct. next to come,  
“ ‘ and incontinent efter the said first day to be de-  
“ ‘ stroyit and put away for ever.’ Directions are  
“ given to certain of the neighbouring proprietors for  
“ prosecuting offenders, and also to the local judges,  
“ with penalties on those who should neglect this duty;  
“ and after this is the exception with regard to the  
“ ‘ cruives and yairs,’ being within ‘ the water of Solway ’



“ or, in other words, where the salt water ebbs and  
 “ flows in the water of Solway.

OSWALD  
 and others

v.

M·WHIR.

13th Apr. 1835.

“ Considering attentively the whole of this enactment,  
 “ it seems impossible to throw a doubt upon its import  
 “ and effect. The exception can only apply to the first  
 “ provision of the statute, with regard to cruives and  
 “ fish dammes, that are within salt waters that ebbis  
 “ and flowis in the Solway,—the intervening provisions  
 “ relating to the same engines used in fresh water,—all  
 “ which are to be taken down by the 1st of October  
 “ then next; and, from the state of the rivers which  
 “ flow into the Solway on the Scottish side, being the  
 “ Annan, Esk, and Nith, all of which, when the tide is  
 “ out, enter the estuary or Frith of Solway, and are  
 “ incapable, in their ordinary state, to occasion any  
 “ alteration as to the freshness or saltness of its water,  
 “ the same conclusion is to be drawn.

“ That the cruives and yairs thus placed in the water  
 “ of Solway were of the most insignificant and inefficient  
 “ description, is apparent from their not having been  
 “ taken away in the beginning of the seventeenth cen-  
 “ tury, along with the exceptions with regard to the  
 “ other Border rivers, the Annan and the Tweed; and,  
 “ from the very particular terms of the exception, it  
 “ might be inferred, that even cruives and yairs could  
 “ only be permitted, if permitted at all, where such  
 “ engines had been in use at the date of the enactment.  
 “ But it seems needless at this time to enter into such  
 “ a discussion. Surely it never can be imagined, that  
 “ an exception from a general enactment with regard  
 “ to ‘ cruives and fish dammes,’ that are within said  
 “ water that ebbis and flowis in the ‘ water of Solway,’  
 “ were to be extended to fishings in a river many miles

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

“ distant from the water of Solway, and held by titles  
“ describing the fishing grounds to be, not in the salt  
“ waters of Solway, but in a river, and within the ordi-  
“ nary banks of a river, containing no portion of salt  
“ water, unless during the short space of time when the  
“ tide-water from the Solway advanced so far.

“ The want of proper evidence and explanation upon  
“ the particulars connected with this discussion has  
“ been already noticed ; and here the burden of proof  
“ lies upon the defenders, the fact of there having been  
“ no practice or possession in support of the argument  
“ now maintained by them being of a negative nature,  
“ and the contrary not to be presumed until the prac-  
“ tice is proved. But it is clear, from the litigations  
“ referred to on both sides, that although cruives and  
“ yairs, and at a late period, far short of forty years,  
“ stake-nets, have been used on the banks of the Solway,  
“ properly so called, no attempt, so far as appears, has  
“ been made (unless during the short interval when  
“ stake-nets were alleged to be in all respects a legal  
“ mode of fishing) to erect such nets, even in the  
“ mouths of the rivers which empty themselves into the  
“ Solway, and which are only mingled with the salt  
“ water of the Solway when the tide is full.

“ The argument, that the water within the banks of  
“ the Nith, when the tide is full, is salt, and that it  
“ could not be called a river, but was truly a portion  
“ of the water of Solway, has been fully stated and  
“ decided upon in many of the former cases.

“ In the case of Seaside, in the frith or estuary of the  
“ Tay, the stake-nets were placed, not in the ordinary  
“ channel of the river, but wholly on the adjoining  
“ sands, while covered by the tide. In the case of

“ Mr. Maule’s fishings, which are farther down the  
 “ river than Seaside, the same judgment was given;  
 “ and this was followed by the decision in the case of  
 “ South Esk, in 1812. There the stake-nets were  
 “ placed several miles within the mouth of the river,  
 “ some of them on grounds called sea-greens or sands,  
 “ and some of them within what is called the bay or  
 “ basin of Montrose, and where no salmon could be  
 “ caught unless in time of tide, and where the river  
 “ South Esk never entered, unless when part of the  
 “ water might be driven up so far by the tide; and the  
 “ water in time of tide was eleven feet and more above  
 “ the level of the river at low water; but in all those  
 “ cases, the salmon fishings were exercised in virtue of  
 “ rights flowing from the Crown, and the stake-nets  
 “ were directed to be removed, as being, in the true  
 “ meaning of the statutes, fishings in the rivers of Tay  
 “ and South Esk, although covered, in whole or in part,  
 “ with salt water during the flow of the tide; and thus,  
 “ whether the stake-nets in question were to be viewed  
 “ as erected upon the banks of a river, or upon the  
 “ shores of the sea, or in an estuary, and where the tide  
 “ ebbs and flows, still the prohibitions were held to be  
 “ of equal force, the right of fishing in all those cases  
 “ being exercised only in virtue of a grant from the  
 “ Crown, and this again restrained and limited by the  
 “ public law, which prohibits the use of any fixed  
 “ engines or machinery within the same bounds. In  
 “ the present case, according to the ordinary meaning  
 “ of the words, as well as according to the usage of the  
 “ country, as far as can be known from the decisions  
 “ quoted by the parties, the fishings in question are not  
 “ in the water of Solway, but in the river Nith. They

OSWALD  
 and others  
 v.  
 M'WHIR.

19th Apr. 1835.

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

“ cannot be exercised unless in virtue of rights flowing  
“ from the Crown, in favour of those who have by their  
“ charters the privilege of fishing with cruives and yairs  
“ in the water of Solway; and the defenders cannot  
“ pretend to have any such right, but merely a right of  
“ salmon fishing, more or less extensive, in the river  
“ Nith, and within the ordinary banks of that river.

“ In some of the late discussions, a doubt has been  
“ thrown out as to the general authority of the decisions,  
“ whereby stake-nets were held to be illegal; and some  
“ observations are stated as having fallen from a most  
“ eminent and learned lord at an early period, implying  
“ that a similar determination would not again be  
“ given. But now, at the distance of nearly thirty  
“ years from the commencement of the challenge, and  
“ by those more recent determinations in the various  
“ cases referred to, and relating to fisheries of great  
“ extent and value, and these determinations nearly  
“ unanimous, and the last of them in 1812, and without  
“ an attempt to obtain a review in the Court of last  
“ resort, it cannot be imagined that any hesitation  
“ will arise. It would indeed unsettle all security of  
“ private right, if such a series of decisions were at  
“ this time to be overthrown, or even held out as liable  
“ to doubt.”

*Lord Balgray.*—“ I concur in the opinion of Lord  
“ Craigie. At the same time I may observe, that all  
“ right of fishing salmon must flow from the Crown, and  
“ that it appears from the grants to the defenders, that  
“ their fishings are limited to certain bounds and limits  
“ applicable to the river Nith; and it is stated in  
“ article 2d of the special case, ‘ That the river Nith  
“ ‘ falls into the Solway Frith, and that these nets are

“ ‘ placed above the point at which the fresh water of  
 “ ‘ the river Nith joins the Solway Frith at low water,  
 “ ‘ and are within the bounds of the river Nith.’ I  
 “ cannot conceive how such fishings ever can be held  
 “ as in the water of Solway. A period of near three  
 “ centuries may have altered, and is known to have  
 “ altered, the boundaries of the frith, but that never  
 “ can nor ever ought to alter the nature of the original  
 “ right.”

OSWALD  
 and others  
 v.  
 M. WHIR.

13th Apr. 1835.

*Lord Mackenzie.*—“ I am still of opinion that the  
 “ interlocutor pronounced by me ought to be adhered  
 “ to. I think that the statement of facts shows that the  
 “ stake-nets in question are placed within the bounds  
 “ of the river Nith, on the banks of that river, being  
 “ dry at low water, and covered when the tide rises by  
 “ the expansion of mixed water, caused by the flowing  
 “ of the tide into that river, though not covered by the  
 “ fresh stream of the Nith at low tide. In this view, I  
 “ conceive these nets to be in *pari casu* with nets  
 “ situated, not within the stream at low water, but so  
 “ as to be overflowed by the rise of the tide, on any  
 “ other part of the banks of the Nith, from its mouth  
 “ up to Dumfries, to which the tide reaches; and so  
 “ considering them, I think they cannot be held to be  
 “ in the Solway, because I see no sufficient grounds for  
 “ extending the Solway up the course of all the rivers  
 “ that run into it, as far as the tide reaches. I think  
 “ the Solway, whether river or frith, must be limited to  
 “ its proper channel and banks, and cannot extend over  
 “ the channel or banks which belong to any river  
 “ flowing into it.”

*Lord Medwyn.*—“ I am of opinion that the inter-  
 “ locutor of the Lord Ordinary is right. I concur in

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

“ the preceding remarks of the Lord Ordinary, and  
“ also in the observations of Lord Craigie generally, so  
“ fully stated by his Lordship in his opinion.”

*Lord Fullerton.*—“ The facts of this case are ascer-  
“ tained by the ‘statement,’ which the parties have  
“ consented to hold a special verdict. It is admitted,  
“ in the first place, that the defenders used stake-nets in  
“ situations ‘which, but for the exception as to the  
“ ‘water of Solway, contained in the act 1563, cap. 68,  
“ ‘would be illegal.’ 2dly, That the ‘river Nith falls  
“ ‘into the Solway Frith,’ and that ‘the stake-nets are  
“ ‘within the bounds of the river Nith;’ and, 3dly, That  
“ the ‘nets are not placed in the fresh water of the  
“ ‘Nith, but on sands or shaulds adjoining thereto,  
“ ‘which sands and shaulds, and the said nets thereon,  
“ ‘are covered by the tide when it flows, but are left  
“ ‘dry when it ebbs.’

“ I consider the meaning of these two last articles to  
“ be clear enough; namely, that the situation of the  
“ nets is ‘within the bounds of the river Nith,’ in  
“ relation to the Solway Frith, into which the river  
“ flows, but is washed by the tides of that frith. In  
“ short, I understand the parties to hold, that the  
“ position of the sands or shaulds on which the nets  
“ are placed is, in relation to the Solway Frith, pre-  
“ cisely that which the sands or shaulds in the Tay were  
“ found, in the Tay fishing cases, to have in regard to  
“ the German Ocean; which last sands and shaulds,  
“ though not within the fresh water of the Tay, but dry  
“ at low water, and covered by the tide when full, were  
“ found to be within the bounds of the river Tay, in the  
“ sense of the act 1563. Indeed, it is this peculiarity of  
“ situation, as admitted in the statement of facts, which

“ alone, as I understand, has given rise to the dispute;  
 “ for it being admitted, in the first article, that the  
 “ stake-nets are in situations which, but for the ‘ excep-  
 “ ‘ tion of the water of Solway, would be illegal,’ and it  
 “ not being disputed on either side that the Solway  
 “ Frith, at the mouth of the Nith, is truly sea, there  
 “ could not well be any question of fact, whether the  
 “ nets were within the bounds of the Nith or on the  
 “ shores and bays of the Solway Frith, as on this last  
 “ supposition the defence must have rested on the  
 “ general rule regarding sea fishings, independently  
 “ altogether of the act 1563.

OSWALD  
 and others  
 v.  
 M'WHIR.  
 —  
 13th Apr. 1835.

“ This statement of facts, then, seems to me very  
 “ fairly to raise the question of law, or of construction  
 “ of the act 1563, respectively argued by the parties.  
 “ According to the pursuer, the expression ‘ the water  
 “ ‘ of Solway,’ used in the exception, does not apply  
 “ to the Solway Frith as an arm of the sea, but is  
 “ limited to the fresh-water stream, or union of streams,  
 “ amongst with the adjacent sands, on which the salt water  
 “ ebbs and flows, at the upper extremity of the Solway  
 “ Frith, and before it assumes properly the character  
 “ of an arm of the sea. If this were correct, the  
 “ admission that the stake-nets in dispute are ‘ within  
 “ ‘ the bounds of the Nith,’ and of consequence con-  
 “ fessedly beyond the bounds of the ‘ water of Solway,’  
 “ explained in this limited sense, would of course be  
 “ fatal to the defence. On the other hand, it is main-  
 “ tained by the defenders, that the term ‘ water of  
 “ ‘ Solway’ in the statute does not denote any tide  
 “ river, or union of tide rivers, with the adjacent sands,  
 “ on which the tide ebbs and flows, but means the arm  
 “ of the sea now bearing the name of the ‘ Frith of

OSWALD  
and others

v.  
M'WHIR.

13th Apr. 1835.

“ ‘ Solway ;’ from which the inference is drawn, that it  
 “ must, in this statute, comprehend all those positions  
 “ within the bounds of the different rivers flowing into  
 “ the Solway Frith which, if the rivers flowed into any  
 “ other part of the sea, would be affected by the general  
 “ prohibitory clauses of the statute. The propositions  
 “ maintained by the defenders are very fairly stated  
 “ in the following summary of their argument : — ‘ In  
 “ ‘ order to bring the fishings of the defenders within  
 “ ‘ the operation of the exception, it is necessary to  
 “ ‘ establish, first, that the ‘ water of Solway’ of the  
 “ ‘ statute, and the Frith of Solway of modern geo-  
 “ ‘ graphy, are synonymous and convertible terms ;  
 “ ‘ and, second, that the exception is so expressed as  
 “ ‘ to apply to the fisheries within the bounds of the  
 “ ‘ rivers flowing into the Solway.’

“ The question, then, in dispute between the parties  
 “ turns entirely on the true meaning of the statute ;  
 “ and, upon considering the arguments of the parties,  
 “ I am of opinion that the construction maintained by  
 “ the pursuer is the sound one. It appears to me to  
 “ be the only construction by which the term used in  
 “ the exception can be reasonably explained, so as to  
 “ be consistent or reconcileable with the general scope  
 “ of the statute. One important reading of the statute  
 “ is fixed by the case of Lord Kintore v. Forbes, as  
 “ distinguished from the cases of the Tay fishings, viz.  
 “ that the prohibition of cruives and fish-dams, within  
 “ ‘ salt waters that ebbs and flows,’ does not strike at  
 “ cruives and dams on the sea, but is applicable only  
 “ to the mouths of rivers, and the sands within their  
 “ boundaries reached by the tide. Now, according to  
 “ the construction of the pursuer, the term ‘ water of



“ ‘ Solway,’ used in the exception, is perfectly con-  
 “ sistent with the sense of the general enactment;  
 “ while, on the other hand, that maintained by the  
 “ defenders cannot be resolved into a consistency with  
 “ the general enactment, unless through the means of  
 “ certain assumptions, which, to say the least, are very  
 “ arbitrary. For, in the first place, it is taken for  
 “ granted that the ‘ water of Solway’ is identical with  
 “ the Frith of Solway, as an arm of the sea. But then  
 “ arises the difficulty, that, in the literal sense of this  
 “ last term, the exception would be unmeaning and  
 “ absurd, as cruives and yairs, on an arm of the sea,  
 “ confessedly do not fall under the general prohibition  
 “ of the statute at all, and are lawful independently of  
 “ the exception; so that, to meet that difficulty, it is  
 “ necessary to have recourse to a second assumption,  
 “ that the term ‘ Frith of Solway’ occurring in such  
 “ a statute, being unmeaning in its literal sense, must  
 “ be held to include all those positions within the  
 “ bounds of the rivers flowing into the Solway Frith,  
 “ which, but for the exception, would be affected by  
 “ the general prohibition. In short, to support the  
 “ defence, it is necessary to hold, not only that the  
 “ ‘ water of Solway’ of the statute means the Frith of  
 “ Solway of modern geography, but that the Frith  
 “ of Solway does not truly mean, in the statute, the  
 “ arm of the sea of that name, but all ‘ the streams  
 “ ‘ and waters that disembogue themselves into the  
 “ ‘ Solway Frith.’

OSWALD  
and others

v.  
M'WHIR.

—  
13th Apr. 1835.

“ I do not consider myself entitled to take such  
 “ liberties of construction with the terms of the statute.  
 “ It seems to me that the very necessity for assuming  
 “ this extraordinary interpretation of the term ‘ Frith

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

“ ‘ of Solway,’ in order to reconcile the sense of the  
 “ exception with that of the general enactment, affords  
 “ a good ground for holding that the ‘ Frith of Solway’  
 “ could not be meant, and that the ‘ water of Solway,’  
 “ in some much more limited sense, formed truly the  
 “ subject of the exception. In the same way, I am  
 “ compelled to reverse the argument of the defenders,  
 “ founded on the denial that the term ‘ water of Solway’  
 “ ever did designate any particular ‘ water’ of the kind  
 “ contemplated in the leading clause of the statute.  
 “ I certainly do not consider that point of antiquarian  
 “ nomenclature to be made out in favour of the de-  
 “ fenders. The quotations from other statutes, such  
 “ as that of 1429, cap. 31, and from other contem-  
 “ porary or nearly contemporary authorities, rather  
 “ favour the presumption, that the term ‘ water of  
 “ ‘ Solway’ meant, at the date of the statute in ques-  
 “ tion, something much less extensive than the Solway  
 “ Frith. But even considering the case, independently  
 “ of the statute, to be doubtful, the legitimate course of  
 “ reasoning would lead, not to construe the statute by  
 “ assuming a particular view of the doubtful point, but  
 “ to the conclusion, that this very statute, excepting  
 “ the ‘ water of Solway’ from a general enactment con-  
 “ fessedly inapplicable to arms of the sea, was strong and  
 “ nearly decisive evidence, that, at the date of the statute,  
 “ the name truly designated some ‘ water’ different from  
 “ an arm of the sea, and resembling in its character  
 “ those to which the general enactment applied.

“ Upon these grounds I am of opinion that ‘ the stake-  
 “ ‘ nets of the defenders are not protected by the  
 “ ‘ exception in favour of the water of Solway, con-  
 “ ‘ tained in the act 1563, cap. 68.’ ”

The Court, on the 8th of March 1833, adhered to the interlocutor of the Lord Ordinary, found additional expences due, and allowed the decree of removing to be extracted ad interim.<sup>1</sup>

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

Mr. Oswald and the other defenders appealed.

*Appellants.*—If the case has been mistried, no fault is imputable to the appellants. To them it always appeared that the parties were, in the first instance at least, at issue upon a mere question of fact as to the locus in quo the fishings are situated,—a question peculiarly fitted for trial by a jury, aided by a view of the subjects. But the judge before whom the case came on for trial thought differently. He was of opinion that it involved more of law than of fact, and, in consequence, the issue, which was sufficient to have raised the proper question of fact, was withdrawn from the jury. If the facts, as stated in the special Case, did not afford to the Court below materials for giving clear or satisfactory opinions, (and which the majority of the consulted judges stated that it did not,) they ought not to have given opinions decisive of a question involving important patrimonial interests; they ought, before pronouncing judgment on the valuable rights of parties, to have required additional information. It is no answer

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<sup>1</sup> 11 S., D., & B., 551. It is stated at page 560 of that report, “ that  
“ when the cause was put out for advising, the defenders (appellants)  
“ craved, that, in respect the judges stated that they did not fully under-  
“ stand the description in the special Case, they should be allowed to have  
“ the matter cleared up; to which it was answered, that the Case was  
“ the agreed on statement of parties, which could not be opened up, but  
“ must form the sole ground of judgment. The Court, holding it  
“ incompetent to open up the statement of parties, and generally con-  
“ curring with the opinion of the consulted judges, adhered to the  
“ interlocutor of the Lord Ordinary.”

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835:

to say, that the parties had agreed on certain facts as affording sufficient materials for judgment. They may be quite wrong in this; and a judge cannot be called upon by parties to decide upon imperfect materials; he has it in his power, and it is his duty, to call for such information as may remove that which is contradictory or obscure; he cannot be precluded from doing so by any agreement of parties, and if such additional information is not communicated, he ought to hazard no opinion on that which is confessedly defective. In order to extricate the case from its present unsatisfactory position, an issue should be ordered to be sent to a jury for ascertaining whether, (in the words of the statute 1563,) the fishings under challenge are not upon the water of Solway.<sup>1</sup>

*Respondent.*—The special Case is not only equivalent to the verdict of a jury, but is the deliberate judicial admission of the parties, and is of the nature of a final agreement, on which the fate of the case is to be perilled. A verdict may be brought under review by motion for a new trial, or by bill of exceptions, but a special Case is final and conclusive, and subject to no review whatever. In the present instance it affords sufficient materials for a decision. The appellants averred that the stake-nets were within the water of Solway, while the respondent averred that they were within the bounds of the river Nith. Now they have distinctly admitted that the stake-nets are situated within the bounds of the Nith, and there is no statement in the Case that they are within the water of Solway. The appellants, therefore, cannot

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<sup>1</sup> The points which were discussed in the Court below were also argued, but it is unnecessary to advert to them.

be found entitled to the benefit of the exception in the statute.

OSWALD  
and others  
v.  
M'WHIR.

19th Apr. 1835.

LORD BROUGHAM.—My Lords, in this case there are many things in the course which the proceedings have taken in the Court below very much to be lamented. In the first place, it is greatly to be lamented that it appears to have occurred to the learned judge at the trial of the case,—and to have been assented to by the counsel,—that that was a question of law, which is just as much a question of fact as any question which can be stated. Here, we shall say, is a piece of ground; the question is, does it lie within the estate of the Duke of Buckingham or of Lord Kenyon? That is undoubtedly a question of fact, whether it is within the one estate or the other; but that is here said to be a question of law. This is a boundary question, referring to the bounds of a fishery near the river Nith, and near or within the water of Solway.

The second mistake in the conduct of the cause is this, that when, upon the ground of its being a matter of law and not a matter of fact, they agreed to stop the cause, and to turn the matter into a statement of the case, which was to have the effect of a special verdict, they did not state the case with the evidence, so as to enable the Court to know what were the facts submitted to the Court, and upon which the conclusion of the Court, if there was to be any conclusion, might be given; instead of that, they give no evidence at all,—no details at all; but they give certain facts, which ought to have been clearly and distinctly stated, and to have been sufficient to enable the Court to pronounce for the plaintiff or for the defendant.

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

The third thing I regret is this, that, instead of stating these facts in such a way as to enable the Court to pronounce a judgment upon them, there are statements which seem to have the appearance of statements of fact, but which do not dispose of the question at all, inasmuch as they are entirely equivocal. “ Within the bounds of “ the river Nith,” is all that they tell you, except they believe that, though it is a fishery within the Nith, nevertheless it is on such a sand, which is covered by the Solway water at flood, and laid bare by the retreat of the Solway water at the ebb of the tide,—that last matter respecting the water covering the ground at high tide, and the retreat of the water at the ebb of the tide, being perfectly immaterial, for the fishery may be either in or out of the Solway, and yet covered by ebb and flow. Then, there is not to be found within the four corners of this Case (which is to have the force of a special verdict, by consent of the parties,) an answer to this material question of fact, Does the fishery lie within the Solway water or without the Solway water?

To these I have unfortunately to add another subject of regret, and that is probably the omission which has led to these omissions, particularly the last omission. Mr. Oswald never appears to have rested his case upon what is the specific and distinct ground, and whereupon he now relies for the first time, that he is within the exception of the statute of 1563, by averring that the fishery is de facto within the Solway water. He says it is not within the bounds of the Nith; the other party say it is within the bounds of the Nith. But as the fishery is struck at, whether in the Nith or not, provided it is not in the Solway water, it is clear the jury ought to have been asked, whether it was in

point of fact within the Solway water, to bring it within the exception. It has been very learnedly argued that Mr. Oswald does say so in the second argument. But he does not; all he says is, that “this fishery being,”—(which means, “because it is,”)—being in a place where the Solway tide ebbs and flows, is therefore within the exception of the statute; but that is not so. It is within the exception of the statute, if it is within the Solway water; but it is not within the exception of the statute, because, wherever it is, it is covered with the Solway tide; that may be twenty or thirty miles up the country, as Teddington is many miles up the river Thames,—its banks may be covered or not covered by the flowing of the tide, but that would not bring it within the exception.

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

My Lords, having made these general observations upon the regret I feel in this case, I come to the great difficulty of all, and which makes these omissions so much a matter of regret, that the parties, I am afraid, have in some sense bound themselves by these admissions, whether they were prudent or not,—whether they were consistent or not,—whether they were accurately understood by themselves or not, which I greatly doubt,—and therefore we have to deal now with an admission, or a verdict having the force of an admission, which concludes us as to this fact, and makes us have this proposition of fact to contend with in deciding the question, namely, that the fishery was within the bounds of the river Nith. What sense we are to give to the words, “within the bounds of the river Nith,” makes another difficulty. It either means that Mr. Oswald's case is gone, because this fishery is out of the Solway, and so out of the exception, and thereby puts him out of court,

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

or it means nothing. One can hardly say that a party is to be supposed to have made use of such an argument against himself; but if it does not mean that, it means nothing at all. Now, it is said that the learned judges, and particularly Lord Corehouse, one of the most eminent judges in Scotland, have given an opinion favourable to Mr. Oswald, and that he has talked as if this was an inland bay of the Solway through which the Nith flowed. If he had said any thing of that kind, it would have been utterly repugnant to the conclusion to which he comes, that this fishery is not within the exception of the statute. He says, "if it had not been for that finding, that the nets  
"are within the bounds of the Nith, I should have  
"thought it competent to enquire whether they are  
"placed on the proper shore of the Nith, or in an in-  
"land bay of the Solway, through which, at low water,  
"the Nith flows;" but he concludes, "but I am not  
"permitted, by the verdict, to go into that enquiry." Now, that is just what I lament, that we cannot do—the verdict has said the bounds of the river Nith cover the place in question;—then, if that place is not within the Solway, the case is concluded. Lord Corehouse says, if it was not concluded, I would give you my opinion upon that which, to my humble judgment, it clearly appears to have been. Then Lord Fullerton's observations upon the water of the Solway I really do not understand, for his lordship speaks of the water of the Solway as distinct from the Frith of the Solway. But then I come to an argument, which does appear to me to have escaped the attention of their Lordships in a great degree. Lord Fullerton glances at it, but only in that part of his note which is impeached of accuracy,



that the Solway is to be considered as extending up no farther inland than the outside of the fauces terræ, to use Lord Hale's expression in his treatise de portibus maris. But if the Solway does not come within them, nor interfere with them, what use was there in the words "except the streams and weirs in the Solway water?" It is clear it was unnecessary to except the Solway deep sea, for the law did not apply to that at all; therefore, unless it meant that the Solway water was that part of the frith that comes a little towards the river Nith on the Scotch side, and the Esk and Annan on the other, I am not prepared to say that I can understand any sensible meaning in that branch of the statute. The Esk and Annan would not be within the branch of the statute, for it is a Scotch act, and the legislature of Scotland had no jurisdiction over England. Last of all, I have to remark upon the prayer of the appellants at your Lordships' bar; they say, upon these grounds we claim to have the interlocutor appealed from reversed or altered, or such other relief as to your Lordships may seem meet,—a general prayer. It is impossible we can alter or reverse the interlocutor, because there is no evidence on which we can decide in favour of the defender as against the pursuer. The only question is, whether we can, after what has passed,—what the parties have admitted, (that which is admitted, if taken in one sense, putting the defender out of court, or, in another sense, meaning nothing,)—whether we can remit, for the purpose of taking further evidence. With respect to remitting, for the purpose of further investigation, independent of all other objections, there may be this, that we are not entitled to do that, after parties have bound and concluded themselves, and shut us out from further

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

OSWALD  
and others  
v.  
M'WHIR.

—  
13th Apr. 1895.

enquiry. That may be one objection; but on the other hand, if pressed by the force of that objection, we take the opposite course, and conclude that the Court below was right in coming to that judgment unanimously as they have done, in favour of the pursuer, then we are in this difficulty, that if we are to construe these words in the only way in which they can bear a construction which does not impute the next thing to insanity to the adviser of the defender, namely, that under cover of referring something to the Court he admitted himself out of court, then we see that the Court below have come to a conclusion of fact, and merely of fact. They have not a tittle of evidence; and if “within the bounds of “the Nith” does not mean “without the Solway,” it means nothing; and we are called upon to affirm a mere conclusion of fact, made by the Court below, without any evidence to show us that we ought to affirm it. My Lords, I have stated these as the difficulties which occur to me. I wish to state them fully in the presence of the counsel, that they may see the grounds on which I feel it impossible in this case, at the present moment, to advise your Lordships to come to a conclusion, and I shall take time to consider whether I can or not get rid of these difficulties. It is a very trifling question, compared with the expence laid out upon it. I dare say the fee simple of a fishery, probably a much better fishery, might have been bought for half the money which has been spent. The litigation has been going on five years; and I should be very loth to find that I must come to a conclusion which should occasion a litigation of five years longer. It is very possible I may find my way out of these difficulties, but I cannot say that I can at present.

The case having stood over,

LORD BROUGHAM said:—My Lords, this case is of some importance as to proceedings connected with trial by jury in Scotland, unfortunately of very much less importance in any other point of view; for very inconsiderable is the value of the stake which has created so much litigation, and which, owing to the mistakes committed in two of its stages below, must yet occasion more. The pursuer and respondent is the owner of a certain fishery on the river Nith, which he has enjoyed by fishing with net and coble; and the appellants and defenders being owners of lands below that fishery, and on the same river, have for many years exercised fishing there by stake-nets. The respondent having obtained an interdict *ex parte*, or in absence, to restrain the appellants from continuing this stake-net fishing, as is said, only until the 26th of November 1816, the latter has, notwithstanding, continued to fish as before, though they say they only did so after the expiration of the interdict on that day. The action of declarator was brought by the respondent, proceeding on these facts, and concluding to have his own rights declared and the appellants perpetually restrained, and for damages for the fishing already carried on by him. A considerable number of averments and denials as well as allegations in point of law, having been made by condescendence and answers and other pleadings, it very plainly appeared that the whole question between the parties turned upon this,—whether or not the appellants' fishery was upon ground within the bounds of the water of Solway; for the act 1563, cap. 68, contains provisions “that the act be in no way extended “to the cruives and yairis being upon the waters of “Solway.” Now, this being the question, the Court directed three issues to be tried, which were by no

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

means happily framed for deciding that matter. They were all in the same words, relating to the different parties, so that we need only direct our attention to the one touching the appellant Mr. Oswald. It was framed thus:—"Whether, during the years 1822 and " 1824, or either of them, in the river Nith, or on the " sands and shoals within the bounds thereof, where " the water ebbs and flows, the defender Richard Alex- " ander Oswald, or John Pagan of Littlebar his tenant, " wrongfully erected or caused to be erected, or from " 1822 to April 1825, or during any part of the same " period, wrongfully used or caused to be used, for the " purpose of catching salmon, certain stake-nets or other " fixed engines, to the loss, injury, and damage of the " pursuer?" Now, there is one most obvious and fatal defect in this issue, beside other inaccuracies, the question being, whether the stake-nets were erected and used within the Solway waters or not? The issue is, whether they were erected within the river Nith or on the sands within its bounds, where the water ebbs and flows? but it is quite possible that the ground within the bounds of the Nith, and over which the tide comes, may be also within the waters of Solway, for nothing can be more indefinite than the description of " in a certain " river," or " on the shoals within its bounds," it being quite impossible to tell without more what are a river's bounds, and the whole argument here relating to the bounds of the Solway waters. Again, the issue is, whether Mr. Oswald wrongfully used the stake-nets? but that involves the whole question of right, and the point of the nets being used in or out of the Solway; so the issue is, whether Mr. Oswald used the nets to the injury as well as damage of the pursuer and respon-

dent; and that again involves the whole question of right, for the damage would be *absque injuriâ*, or not, according as the nets were used within the Solway waters or without. It is therefore quite plain that the issue ought to have been framed thus:—"Whether the defender  
 "or his tenant erected or caused to be erected," (a very useless addition, however, "erected" being quite enough,) "or used or caused to be used," (equally useless,)  
 "for the purpose of catching salmon, any stake-nets or  
 "other fixed engines within the waters of Solway to the  
 "damage of the pursuer?" Had such an issue been directed I question if the subsequent errors which encumber this case could have been committed. However, the issues directed by the Court came on to be tried in April 1830 at Dumfries Circuit Court, when it most unfortunately was supposed by the Court and the parties that this was a question of law, and accordingly the jury was by consent discharged and a special Case agreed upon, it being settled that the Court should pronounce judgment upon the facts in that Case as if it were a special verdict. Here I must stop to remark upon the extraordinary circumstance of the Circuit Court and the parties attending it supposing that there was no issue of fact to try, when the Court above had actually directed the trial of the issues. The Court of Session, at least the Lord Ordinary, had under the power of the Judicature Act remitted to the Jury Court, where the issue was framed: the interlocutor directing the trial of course proceeding upon the ground of there being a question of fact to try, namely, the local situation of the fishery in question. This is no question of law, but as strictly and as plainly a question of fact as any one's imagination can conceive; yet the Circuit Court, immediately on the

OSWALD  
 and others  
*v.*  
 M'WHIR.

13th Apr. 1835.

OSWALD  
and others

v.  
M'WHIR.

13th Apr. 1895.

trial being called on, decides that it is a question of law ; in other words, decides that the Court of Session did not know what it was about, and that it had sent a point of law to be tried by a jury. It is quite true that the insertion of the terms “ wrongfully ” and “ injury ” in the issue gave much colour to this opinion of the Circuit Court. Nevertheless, I cannot help thinking that it would have been far better to try the cause as a question of fact, paying due regard to the two words most preposterously added. The judge, in that case, would have been called upon to direct the jury in point of law, and he would then have been obliged to look to the act 1563, cap. 68. Hence he must have told the jury, that though the fishery was in the Nith, or within its bounds, unless it was also without the bounds of the Solway water, it was not wrongfully used ; also, that if it were within the bounds of the Nith, and not in the Solway, it might still be wrongfully used. The frame of the issue made it perhaps difficult to deal with ; it opened a wide door for error and miscarriage. Still I conceive that the trial might have been had. If, indeed, the real question had been put to the jury by the issue,—namely, in or out of the Solway, without any such absurd words as “ wrong-fully ” or “ injury,” no difficulty at all could have arisen. But the special Case, or, as it is called, the statement of facts, was prepared and signed by both parties ; and as it was to enable the Court to dispose of the supposed question of law, we might have expected all the facts to appear upon it, which were necessary for leading to a decision, by raising the question of law ; yet it will be extremely difficult for any one to find what question of law is raised upon this special Case. There is indeed none ; for the only position of law involved in the whole

case is one upon which both parties are quite agreed, viz., that the fisheries in the Solway waters are exempt from the operations of the act. Accordingly, the Court is called upon to decide not any question of law, but one of fact merely, viz., Whether the fishery of Mr. Oswald is in or out of the Solway?—and this is the very question which ought to have been sent for trial to the jury. Thus, the Court having sent a wrong issue of fact, viz., not “in or out of the Solway,” but “in or out of the “Nith,” a verdict is returned, which leaves the Court itself to decide as matter of law what should have been tried as matter of fact. Instead of asking the jury the plain question, Is or not the fishery in the Solway? they ask the question, Is it or not in the Nith? An answer is returned to this effect: “The fishery is in the Nith; and “we leave you to say whether or not, in point of law, it is “in the Solway?” What should we have said here of this kind of proceeding? The question arises, whether Blackacre is or is not properly situated in the parish of Dale? To determine this, the Court directs an action to try whether Blackacre is or is not properly in the parish of Swale; and there is a special verdict returned that it is in Swale, but leaving it to the Court to say whether it may not be still properly in the parish of Dale. The error was mainly in the frame of the issue, which gave some colour for saying a matter of law had been involved in the issue, by the use of such words as “wrongfully,” and “injuriously.” But it appears to me that an unfortunate course was taken, by refusing to try this under the kind of direction which I before adverted to, which would substantially have raised the true question, confused and obscured by the frame of the issue. The Case, however, is prepared; and we should

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

OSWALD  
and others  
v.  
M'WHIR.

—  
13th Apr. 1835.

at least then hope to find facts stated which might enable the Court to decide the question referred to it, of “ Solway waters or not.” For in no conceivable way could the Circuit Court imagine that any thing was left for the Court above except by supposing that they, the Jury Court, had to state particulars, from which the Court above should deduce the conclusion that the fishing was in or out of Solway water. No such thing, however, is to be found in the Case substituted for a special verdict; on the contrary, we find only a statement of that which leaves us just as incapable of solving the question, as when that question was sent, or supposed to be sent, for trial. It first states, that the defenders (appellants) did use stake-nets, which would be illegal, if it were not for the exception of the Solway water in the statute 1563, that is to say, if those nets were out of the Solway water. It thus states in terms, that the whole question is, whether Mr. Oswald’s fishing-ground is in or out of the Solway. It proceeds to state, that the nets are above the junction of the Nith and the Solway Frith at low water, which they may obviously be and yet be in the Solway; and it adds, that they are not in the fresh water, but in the places uncovered by the ebb of the sea, and covered by the flow, and are within the bounds of the Nith, unfortunately using the very words of the issue, on which I have already remarked that they leave the matter quite undetermined, because the nets may be within within the bounds of the Nith, and yet not without those of the Solway; and the Case says not one word of what are the bounds of the Nith and Solway. The Case then states, that the question left for the Court is, whether the nets are within the exception or not, — that is, within the



Solway or not; and if the Court shall be of opinion that they are not, then that a line, which is described, shall be drawn, and the defenders restrained from fishing within that line. If the statement had been that this line is the Solway boundary, there could have been no doubt as to the fact in dispute, but this is the matter left to the Court. The statement agreed to be taken as a special verdict is this,—that the nets are in a certain place, without finding that this place is in or out of the Solway; that the Court is to say, whether this place be in or out of it; and if it holds the place out of the Solway, then that the Solway's boundary is the described line. Three remarks are obvious upon this statement or finding:—First, That as calling a question matter of law does not make it such, so stating that the Court is to determine if a certain place be within the exception of the act or not by no means makes this a question of construction; for the place being within or without the exception depends solely upon its being within or without the Solway; consequently, that question of mere fact and boundary is left to the Court. Secondly, That the line which is to be drawn by the Court only, after it shall have decided the questions, is exactly the decision of that question; and consequently the statement tells the Court, as far as the case before them is concerned, that the Court must determine the question, aye or no; and that if it determines it aye, it decides in the affirmative, the truth of which no man will dispute, any more than he will doubt the entire worthlessness of the information. Thirdly, That the facts stated, or pretended to be stated, and on which the Court is called to draw a conclusion merely of fact, are wholly incapable of leading to any conclusion at all, unless we supply what is not to be

OSWALD  
and othersM<sup>r</sup> WHIR.

13th Apr. 1835.

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

found in any way stated, viz., that the bounds of the Nith and Solway in no way interfere, and that whatever is within the Nith's bounds is without the Solway's. If, indeed, we do supply this, the case is abundantly clear; but, then, it is a statement not enabling the Court to determine, but itself determining the whole matter in dispute; for it is not only in substance, but it is in terms, a finding for the pursuer; it is a distinct statement that the locus in quo is not in Solway. Now, we are not at liberty to supply any such statement; and for two obvious reasons: first, no party in his senses could in terms admit his case to be wrong by admitting the very point, and the only point in dispute, to be against him, and that in the very statement upon which he is content to have the whole matter argued; and, secondly, the reference of the question to the Court, viz., whether the locus in quo is in the Solway or not, and the addition, that if the Court shall decide, and only if the Court shall decide in the negative, then the boundary line shall be such as to exclude the locus in quo, clearly shows that there is no kind of assumption made like that which I have spoken of supplying. Therefore we must take the statement as it is, supplying nothing at all; and then the parties or jury (by agreement) have left the fact just where they found it, by only telling us in answer to the question, "Is the locus in quo within the Solway or "without?"—that it is within the Nith; and not telling us whether the Nith and Solway are separate; and, therefore, not enabling us to say how far a place may be both within the bounds of the Nith and those of the Solway. Such was the case with which the Court below had to deal. They had sent to be tried an issue of fact; and instead of trying it, the Jury Court sent them back an intimation,

that it was an issue of law, which they, the Court of Session, were required to decide. Then it appears that the question left for the decision of their Lordships is a pure question of fact; and I should doubt, had the matter rested here, whether, in the circumstances of an issue having already been sent for trial by a jury, the Court ought to have touched the case returned at all. I incline to think that their Lordships should have said, "This is still a mere question of fact, and therefore you, the jury, must try it yourselves." For observe how, by collusion, as it were (and I use the word without any offence), the parties and the Jury Court may defeat every trial of an issue, and send all facts to be decided by the Court. This might have been my opinion, even if, by the admissions of parties, facts and circumstances had been stated sufficient to enable the Court to draw a conclusion of fact from those admissions; but it is unnecessary to go into that part of the statement. The special verdict here contains nothing which could enable the Court to draw that inference in point of fact; it leaves the question exactly where it originally stood; and the Court of Session is exactly in the state of information upon the facts, after the return or verdict, in which it was before the jury trial, and which rendered an issue necessary for its information. I have already fully explained how this is, and proved that the special Case or verdict, by saying nothing of the Solway's boundary, leaves the whole question as it stood on the face of the issue. In my humble opinion, much of this confusion and miscarriage arose from the inartificial and erroneous frame of the issue, which raised a question not as to the Solway, but the Nith, and only let in the question really in dispute as to the boundary of the Solway by the introduction

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

of the words “wrongfully” and “injury,”—words tending by implication to raise the point which should have been plainly and distinctly raised in terms, viz., whether or not the locus in quo was within the exception of the statute, that is, within the Solway water’s boundary. The Court below did not take this view of the case, but proceeded to dispose of the question. Immediately, however, their Lordships found the difficulty in which they were involved, by the want of materials in the special Case on which to form their opinion; and all their efforts, of course, were unable to extricate them from the difficulty, because they could not discover the findings of fact necessary for the determination of the question. They only, as I think, arrive at their conclusion in the respondent’s favour by supposing what is clearly not in the statement; and is, for the reasons I have given, to be held as wholly excluded from that statement, namely, that within the boundary of the Nith means beyond the boundary of the Solway; in other words, that the appellant admitted in terms that his fishing was out of the Solway, being the only matter in dispute, in which case there could have been no question for the Court, either of law or of fact, to determine. The party would have signed a judgment against himself. One of the learned judges, indeed, introduces a new view of the case, by supposing as a fact that the water of Solway means something different from the Frith of Solway; but I can see no warrant for this, because it is quite certain that there is no such thing in the finding or special Case; and no man ever heard of the proper name of Solway, except as designating the frith or arm of the sea, there being no river of that name. “Water of Solway” must, as I apprehend, be taken to mean that part of the Solway

Frith which is within the bounds of the fresh water that flows into it; I can give it no other meaning. All this appears entirely a question of fact: it is a mere question of boundary, of the boundaries of a fishery, and whether or not it is within the water of Solway. After all the facts are found or agreed upon, and among others, whatever facts relate to the name "Water of Solway," it is barely possible that the Court may still have to determine whether the locus in quo is in the district which the proviso in the statute denominates the Water of Solway; but this will then be purely a question of construction, which at present it is not; or at least at present there are no materials in fact on which the Court can deal with it as a matter of construction. Thus, it is possible that evidence may be given of the name Water of Solway having in all times past been used to denote one known portion of the Solway Frith, or the fresh water neighbourhood bordering upon and adjoining to the frith. That would at once dispose of the case as a boundary question; but other circumstances short of such evidence may also be found to enable the Court consistently and clearly to say whether the locus in quo is in the Solway or not. All that relates to the neighbourhood, and to the name, and to the sea, and to the river, may be examined with advantage to the ascertaining of the point, Does or Does not the locus in quo lie within the Solway water? I therefore think that the cause must be remitted, with directions to try the issue, framed as I have already stated,—“Whether or not the defenders did fish salmon by stake-nets or other fixed engines, or erect or use such nets or engines for the purpose of fishing salmon within the waters of the Solway, to the

OSWALD  
and others

v.  
M'WHIR.

—  
13th Apr. 1835.

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

“ damage of the pursuers ?” If any finding on the Nith is deemed desirable by the Court then there may be retained the first of the present issues, striking out the words “ wrongfully,” “ or caused to be erected,” “ or “ caused to be used,” “ loss,” and “ injury ;” “ caused “ to be” is unnecessary ; if a man causes a certain thing to be done, in law he does that thing. But then two other issues must be added, in these words :—

“ 2. Whether the stake-nets, or other engines, if any, “ erected or used by the defenders for fishing salmon, “ were within the water of the Solway ? 3. Whether “ the place on which the stake-nets, or other engines, “ if any, erected or used for fishing salmon by the de- “ fenders, being within the bounds of the Nith, was “ within or without the bounds of the water of Sol- “ way ?” That this House can remit for the purpose of having another issue tried is clear. Your Lordships did so in the great case of Duff v. Fife, I believe more than once—once I know—and seven issues having been before tried, which, putting all the evidence in issue, had failed to produce a verdict of any use, one comprehensive issue in the nature of a Devisavit vel non was substituted in their place by this house : nor does the admission and consent of the parties here at all limit our power to do so. For if parties can only agree on admissions, which leave the matter of fact just as much in dispute as before the trial or proceeding commenced, we have no course left but to require either further admissions, or the verdict of a jury, which shall find the necessary facts. The Court below have, from the necessity of the case in which the imperfect verdict had placed them, drawn a conclusion of fact upon data which give us no means of determining whether they were right or

wrong; they may have been right, but we cannot say so. The Judicature Act, 6th Geo. 4, cap. 120, provides, in the 33d section, for the case of admissions by the parties, which shall preclude the trial of an issue framed and settled; but it gives no power to the Jury Court, as I read the enactment, even with consent of the parties, to hold the whole issue a question of law, and send it back to the Court of Session in the state in which it was sent down by that Court for trial. It only enables the parties, by admissions of fact, to preclude the necessity of trial. The section excludes all review by appeal, but in one only event, and in one only kind of question arising:—in case the parties shall differ on the matters of fact, but agree that a preliminary matter of law should be decided before the trial of the issue, or in case one party requires this, the other resisting it, then this previous determination being obtained shall not be appealable; otherwise indeed the trial must be stopped. I have gone more at length into this case, because the decision below was unanimously pronounced; and, consistently with that profound respect for the learned judges, which, in common with your Lordships, I always must feel, I was bound to justify my differing in opinion with them. It is very possible that the further inquiry may fail to show facts sufficient to justify either the jury in drawing a clear and satisfactory inference in point of fact, or the Court in deciding satisfactorily an inference of law. This is a fate by no means peculiar to the present question; but the regularity of our proceedings in jury trials seemed to require the course which I have ventured to recommend, and which I now move your Lordships to take.

OSWALD  
and others  
v.  
M'WHIR.

13th Apr. 1835.

OSWALD  
and others  
v.  
M'WHIR.  
—  
13th Apr. 1835.

The House of Lords declared, " That it is the opinion of this House that the " Statement of Facts " in the pleadings in this cause mentioned as having been submitted to the Court for their judgment thereon, does not furnish a sufficient ground for the judgment of the Court upon the question in this case, and that there ought to be a further trial before a jury upon another issue ; and therefore it is ordered and adjudged, that the interlocutors complained of in the said appeal be, and the same are hereby reversed : And it is further ordered, that the cause be remitted back to the Second Division of the said Court of Session, in order that their lordships may direct another trial before a jury upon the following issue ; that is to say, Whether the places in which, during the years 1822, 1824, and 1825, stake nets or other fixed machinery were placed and used for fishing salmon by the defender Richard Alexander Oswald, and the other defenders respectively, or their respective tenants, are within the water of Solway ? And it is further ordered, that the defenders respectively in the action in the Court below be pursuers in the trial of the said issue : And it is further ordered, that the before-mentioned " Statement of Facts " is not to be used or founded on by either party as any evidence or admission of any fact therein alleged : And it is further ordered, that the said Court of Session do and shall make such orders and give such directions relative to the costs already paid or ordered to be paid by any of the parties in this cause as to such Court shall seem meet, and do further proceed in the said cause in such manner as shall be just and consistent with this judgment.

MACDOUGAL and BAINBRIDGE — SPOTTISWOODE and  
ROBERTSON, — Solicitors.



[13th April 1835.]

**JAMES FORRESTER**, Appellant.—*James Russel—  
A. M'Neil.*

**Trustees of Mrs. MARY MACGREGOR OF FORRESTER,**  
Respondents.—*Dr. Lushington—Mr. Stewart.*

*Husband and Wife—Liferent and Fee—Clause.*—A husband by antenuptial contract of marriage having conveyed his “half of the nine-shilling-and-ninepenny land of old extent in the Garth quarter called Bullshill” to himself and his promised spouse “in conjunct liferent during all the days of their lifetime, and to the longest liver of them, and their heirs or assignees in fee.”—Circumstances in which held (affirming the judgment of the Court of Session) 1. That the conveyance comprehended the whole lands in the Garth quarter belonging to the husband, being the half of a nine-shilling-and-ninepenny land, which half was called Bullshill. 2. That the wife having survived the husband the fee was in her.

**JAMES RIDDOCH** of Bullshill, on the 23d Dec. 1751, conveyed to himself and to his wife Janet Hutton “all and haill the just and equal half of the nine-shilling-and-ninepenny land of old extent in the Garth quarter, extending to a four-shilling-and-tenpence-halfpenny land of old extent, commonly called Bullshill, with houses, &c., all lying within the barony of Temple-Denny, parish thereof, and sheriffdom of Stirling.” Janet Hutton was infeft; and, having survived James Riddoch, on the 29th Dec. 1780 she conveyed the lands of Bullshill, described as above, to her second husband, James Forrester, who was infeft upon her disposition. Janet died, and

2D DIVISION.

Lord  
Meadowbank.

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.  

---

13th Apr. 1835.

James Forrester married Mary Macgregor. By contract of marriage entered into between them on the 9th August 1787, “ James Forrester, in consideration  
“ of the sums after mentioned, contracted on the part  
“ of the said Mary Macgregor, disposes and conveys  
“ to and in favour of himself and the said Mary Macgregor, his promised spouse, in conjunct liferent  
“ during all the days of their lifetime, and to the  
“ longest liver of them, and their heirs or assignees, in  
“ fee, heritably and irredeemably, all and haill the just  
“ and equal half of the said James Forrester’s nine-shilling-and-ninepenny land of old extent in the  
“ Garth quarter, commonly called Bullshill, with the  
“ houses, &c., all lying within the parish of Denny and  
“ shire of Stirling, and which sometime belonged to James  
“ Riddoch, who disposed the same to Janet Hutton,  
“ deceased, the said James Forrester’s late spouse.” By the procuratory of resignation contained in this contract  
“ he also resigned and surrendered all and haill the  
“ just and equal half of the foresaid nine-shilling-and-ninepenny land of old extent in the Garth  
“ quarter, commonly called Bullshill, and whole pertinents thereof, lying as aforesaid ;” and granted precept of sasine for delivering heritable state and sasine of  
“ all and haill the said just and equal half of the foresaid nine-shilling-and-ninepenny land of old extent  
“ in the Garth quarter, commonly called Bullshill, and  
“ whole privileges and pertinents of the same, lying as  
“ aforesaid, to him the said James Forrester, and Mary  
“ Macgregor his promised spouse, in conjunct liferent,  
“ and to the longest liver of them, and their heirs or  
“ assignees in fee, heritably and irredeemably.”

Upon this precept infestment was given of “ all and  
“ haill the foresaid just and equal half of the foresaid

“ nine-shilling-and-ninepenny land of old extent in the  
 “ Garth quarter, called Bullshill, and whole privileges  
 “ and pertinents of the same, lying as aforesaid, to the  
 “ said James Forrester and Mary Macgregor, in conjunct  
 “ liferent, and to the longest liver of them, and their  
 “ heirs or assignees in fee, heritably and irredeemably.”

FORRESTER  
 v.  
 Trustees of  
 MACGREGOR  
 or FORRESTER.  
 13th Apr. 1835.

James Forrester died about the year 1801, and was  
 survived by Mary Macgregor, and on the assumption  
 that she was fiar, she possessed the lands, and sold to the  
 late George Brown, writer, St. Ninian's, a small portion  
 of them, the price of which was paid to her, and the dis-  
 position was granted by her in her own name. The  
 pursuer was the eldest son of the marriage, and alleging  
 that he was fiar, and that his mother had only a life-  
 rent of the lands, he proceeded to act on that feeling.  
 His mother then applied for and obtained from the  
 Sheriff of Stirlingshire an interdict against him. In  
 order to have her right declared, she brought an action  
 before the Court of Session, setting forth the above facts,  
 and concluding “ that the pursuer has, in virtue of her  
 “ rights and infestments in the lands and others above  
 “ written, the only good and undoubted right and title  
 “ to all and whole the foresaid just and equal half of  
 “ the nine-shilling-and-ninepenny land of old extent in  
 “ the Garth quarter, called Bullshill, extending to a  
 “ four-shilling-and-tenpence-halfpenny land of old ex-  
 “ tent, with the pertinents and privileges thereof, as  
 “ described in manner above mentioned, or as the same  
 “ might be farther or otherwise described in the said  
 “ deceased James Forrester's titles thereto, being the  
 “ whole of the said lands of Bullshill and others, to  
 “ which the said deceased James Forrester himself had  
 “ right, and that the same pertains heritably in property

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.

19th Apr. 1835.

“ to the pursuer.” There were also the ordinary conclusions against molesting, and for moving, expences, &c. The appellant lodged defences, in which he pleaded, that “ the clause of the marriage contract gave the pursuer “ only a right of liferent in the lands therein expressed, “ but not a fee.”

The Lord Ordinary reported the question on cases; and on the 3d June 1831, the Court pronounced this interlocutor, “ The Lords having advised the cases for “ the parties, and heard counsel thereon, they repel the “ defences, and decern in terms of the conclusions of the “ libel.”

James Forrester appealed.

*Appellant.*—1. Although the conveyance, whether in fee or liferent is limited to a half, yet the respondents maintain that they have right to the whole of the lands. This theory they found upon the following statement: James Forrester, they say, never possessed a nine-shilling-and-ninepenny land; and that all the lands which he possessed at Bullshill amounted to only the half of a nine-shilling-and-ninepenny land. He committed an error, therefore, it is said, when he thought that he had a nine-shilling-and-ninepenny land, and conveyed, in his marriage contract with the pursuer, only the half of it, and that what he truly intended to convey was all that he himself possessed.<sup>1</sup>

The radical error of this argument lies in taking the reference to the valued rent as being taxative instead of demonstrative, and deriving the interpretation of the

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<sup>1</sup> 9 S., D., B., p. 675. The original pursuer Mary Macgregor died, and her trustees were sisted in her place.

clause, not from what is distinct and essential, but from what is indifferent. James Forrester was not disposing a superiority; nor was he conveying a certain quantity of valued rent. He was conveying his lands, or part of his lands, of Bullshill; and, if he has distinctly set down, whether he conveyed the whole, or only a part of them, the expressed dispositive words can be neither limited nor extended by a reference to a mere accidental quality of the lands, which might safely have been omitted altogether. The lands, and the extent and boundaries of the lands, remained the same, whether they stood valued in the cess-books at nine shillings and ninepence, or at four shillings and tenpence halfpenny. If James Forrester had conveyed "all and whole my ten-shilling land of Bullshill," and it had turned out that the lands of Bullshill formed only a five-shilling land, it could never have been maintained that only one half of the lands was carried instead of the whole. The respondent's plea proceeds on the assumption, that, although dispositive words distinctly mark out the quantity conveyed, they are to be altered and contradicted by references to the valued rent, where the valued rent is of no moment in the transaction. The express conveyance in the contract is of only one just and equal half of James Forrester's lands of Bullshill, and by that the rights of the parties must be regulated.

If it were either proper or necessary to have recourse to more indirect indicia of the maker's intention, it would be important to observe, that the marriage contract contains likewise a conveyance to the moveables, in the event of the pursuer surviving her husband, and it gives her right to only one half. In a question of intention, it would be difficult to conceive why the hus-

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.  
13th Apr. 1835.

FORRESTER  
v.  
Trustees of  
MACGREGOR  
OF FORRESTER.

13th Apr. 1895.

band should have meant to give her a greater share of his heritable property — which was all his own before the marriage — than of the moveables, to which, as forming the proper common stock of the spouses, she had a direct and substantial right.

2. There is nothing in the words themselves, or their grammatical construction, to raise a fee in the surviving wife; all they give is a liferent. There is, first, a conjunct right of liferent “to himself and the said Mary Macgregor, in conjunct liferent during all the days of their lifetime;” next comes a right of survivorship, “and to the longest liver of them;” lastly, comes a right of fee, “and their heirs in fee.” But there is nothing in the mere structure and arrangement of these members of the clause to make the intermediate right of survivorship applicable to the fee which follows, more necessarily than to the liferent which precedes. From its position it is, at least, equally applicable to both. The words, “and to the longest liver of them,” are merely the following out of the liferent, which has already been given as a conjunct liferent, and is thus continued in favour of the survivor. It is a conjunct liferent during the lifetime of the spouses, then a liferent during the lifetime of the survivor, then a fee in the heirs of the spouses, which character is held by the appellant, the eldest son of the marriage, claiming the property, which was exclusively his father’s. But independent of the words, which it is contended give a liferent and nothing else, the circumstances show that this must have been the intention; and if there be any ambiguity, effect must be given to the evidence of intention.

The property came entirely by the husband, and

belonged to him when he entered into this marriage. At the date of the marriage, Mary Macgregor was not possessed of any heritable property, and it does not appear that she had even any moveable goods. In the marriage contract, indeed, she conveys, in general terms, all debts and sums of money whatsoever, presently “pertaining and belonging to her, with the “bonds, bills, and other vouchers of the same;” but all this would have passed to her husband jure mariti, without a conveyance. On the other hand, she was secured in one half of the moveables, while her legal share, as there are children of the marriage, would have been only one third. Even under the pleas which the appellant is maintaining she will liferent one half of the heritable property, while her right of terce would have given her a liferent of only one third. But according to her construction she was to have the power of disposing at her pleasure, in a second marriage contract for instance, of the whole of her husband’s lands, to the utter deprivation and destitution of the children of that very husband.

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.  
13th Apr. 1835.

That construction leads to such a conclusion as no court will adopt, unless the words be so clear and express as to leave it no means of escape. Marriage contracts are always to be construed so as not to leave the children of the marriage unprovided, with due regard to the just rights of the widow. The law presumes the intention of the spouses to have been to secure their property for their issue, after they have themselves enjoyed it; and it particularly presumes this to have been the intention of the husband in regard to his own possessions, and more especially still, in regard

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.  
—  
19th Apr. 1835.

to his real property, which, of itself, formed no part of the common stock.

“ The person from whom the subject flowed is  
“ accounted fiar,” says Mr. Erskine<sup>1</sup>, “ unless where  
“ it appears, from the strain and contexture of the con-  
“ junct right, that the fee was intended to be given to  
“ the other.”

Thus in *Muirhead against Paterson*<sup>2</sup>, the wife, who was possessed of some heritable property, entered into a marriage contract, by which she disposed that property  
“ to the said Alexander Paterson, my husband, in con-  
“ junct fee and liferent, and to our foresaid children,”  
viz. “ the children procreate or to be procreated of  
“ our marriage.” The marriage having been dissolved by the predecease of the husband without children, his heirs claimed the property on the ground that, by the words of the deed, he had been fiar. So far as the naked words themselves went, he was fiar : a right to husband and wife, in conjunct fee and liferent, and to the children generally, is a fee in the husband. But the Court, altering the judgment of the Lord Ordinary, held that the fee was still in the wife, and held so principally on the ground that the property had originally belonged to her. Under this rule, the appellant is entitled to maintain, unless there be express words which clearly exclude him, that the fee was intended to be reserved for the heirs of the husband, from whom the property flowed, especially when these heirs, as children of the marriage, were the proper and natural depositaries of the fee.

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<sup>1</sup> Ersk. iii. 8. 36.

<sup>2</sup> Jan. 16, 1824. 2 Shaw, p. 617. (p. 525, New Ed.)



Another source from which assistance is derived in ascertaining whether doubtful words give a liferent or a fee is found in the consideration, on whose heirs the destination is made to terminate. The maxim is, “he “ is *fiar cujus hæredibus maxime prospicitur*<sup>1</sup>;” and, according to this maxim, “the wife is *fiar*, where her “ heirs are more favoured in the substitution than those “ of the husband.” But, in the present case, there is no such preference. The destination does not terminate on the heirs of the wife, as distinguished from those of the husband. It is framed to carry the property to the children equally the heirs of both; and it is a child equally the heir of both who is now claiming the fee in the person of the appellant.

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.  
13th Apr. 1835.

This the appellant denies, unless these words of survivorship connected with a fee, and where that fee is subsequently destined to the heirs of the spouses, do in law necessarily import a fee in the wife, unless they be accompanied by some of the known circumstances, such as the preference of her heirs, or the property being hers, which confessedly would give her more than a liferent. It is certain that the law of Scotland, down to the period of a solitary decision on which the respondents whole plea is founded, was just the reverse. A series of cases had fixed, that such clauses, however they might sound, gave the surviving widow only a liferent. In *Aiton v. Johnston*<sup>2</sup>, “Bartill Tullo and Jamieson “ his spouse having lent 7,000 merks to the Gudemen “ of Carberry, he obliged himself to refund the said “ sum to them, and the longest liver of them two, suc- “ cessive, at the term of payment, and failing thereof,

<sup>1</sup> Ersk. iii. 8. 36.

<sup>2</sup> Nov. 10, 1609; Dict. p. 4198.

**FORRESTER** “ to infest them, and the longest liver of them two, in  
 v. “ conjunct fee, and their heirs, in an annual rent of it,  
**Trustees of** “ furth of his lands.” There were no children of the  
**MACGREGOR**  
**OR FORRESTER.** marriage. The husband predeceased. In a competition  
 13th Apr. 1835. between his heirs and those of the widow the lords  
 found that the widow had been only life-rentrix, and that  
 her heirs had no claim to any part of the sum.

In *White v. Bickerton*<sup>1</sup>, “ a bond, binding a debtor  
 “ to pay a sum to a man and his spouse, the longest  
 “ liver of them two, and to their heirs, no bairns being  
 “ betwixt them two, after the decease of the husband  
 “ the wife claims right to the sum as pertaining to her  
 “ by the bond, and her heirs.” But the Court found  
 that these words did not enable her to transmit any  
 right to her heirs, and that the sum belonged to the  
 heirs of the husband. In *Justice v. Stirling*<sup>2</sup>, the desti-  
 nation was, “ to the said husband and his spouse, and  
 “ the longest liver of them two, and the heirs gotten  
 “ between them, or their assignees, which failing, to the  
 “ heirs of the last liver.” On the death of the husband,  
 the widow claimed the sum as fiar ; but the Court found  
 that she had only a liferent, and that the fee was in the  
 children. It thus appears, that a right taken to the  
 husband and wife conjunctly, and to the longest liver of  
 them, and their heirs, gave the surviving widow only a  
 liferent, reserving the fee to the husband and his heirs.

But a different rule is said to have been introduced  
 by the case of *Ferguson* in 1739, and on that case, and  
 the doctrine laid down by Mr. Erskine, as deducible  
 from that case, stands the whole argument of the respon-

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<sup>1</sup> Dec. 9, 1630 ; Dict. p. 4199.

<sup>2</sup> Jan. 23, 1668 ; Dict. 4228.

dents. Erskine says, “ where the right is taken to the  
 “ husband and wife, and to the longest liver, and their  
 “ heirs, the fee is, in the event of the wife’s survivorship,  
 “ adjudged, by our later decisions, to belong solely to  
 “ the wife, to the entire exclusion of her husband’s  
 “ heirs, as if the right had been granted in the same  
 “ terms to two strangers, contrary to our older practice.”  
 And he alludes to the case of *Ferguson v. M’George*<sup>1</sup>,  
 22d June 1739, which is thus reported by Lord Kil-  
 kerran :—“ Where a bond bore the sum to have been  
 “ received from husband and wife, and was taken to the  
 “ man and his wife, and the longest liver of them two,  
 “ their heirs, executors, and assignees, the marriage  
 “ dissolving by the predecease of the husband without  
 “ children, the sum was found to belong absolutely to  
 “ the wife, as longest liver ; several of the Lords dis-  
 “ senting, who were of opinion, that it resolved into a  
 “ liferent only to the wife, agreeable to the express  
 “ opinion of Craig, L. 2. Dieg. 22, and that the con-  
 “ struction put upon that opinion of Craig’s, that it  
 “ referred only to proper feus and not to money, was  
 “ without foundation, his reasoning in that passage  
 “ applying to the one as well as to the other. There  
 “ was no doubt but the husband was so far fiar, as not  
 “ only to have the disposal of the money during his  
 “ life, but that it was also affectable by his creditors.  
 “ But the question turned upon this, whether, by the  
 “ words, ‘ their heirs,’ were only understood the heirs of  
 “ the marriage, who alone could be properly called  
 “ their heirs, and that the farther substitution of the  
 “ husband had, per errorem, been neglected, as being

FORRESTER  
 v.  
 Trustees of  
 MACGREGOR  
 or FORRESTER.  
 13th Apr. 1835.

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<sup>1</sup> Dict. 4202.

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.  
—  
13th Apr. 1835.

“ dicto loco ; or if the natural force of the words, ‘ their  
“ heirs,’ in this case was the same as if the bond had  
“ borne ‘ and to the heirs of the longest liver ;’ which  
“ last prevailed, as above.”

It seems manifest that the Court, in deciding this case, never imagined that it was intermeddling with the ordinary rules regulating destinations of heritable property. On the contrary, Lord Kilkerran’s statement of the opinions of the Judges, in reference to the authority of Craig, shews that they did not think the same rule would apply to proper feudal subjects.

Besides, this decision, and the doctrine founded on it, applies only to the case where there are no children or the marriage to satisfy the term “ their heirs,” and where the question arises between the survivor, and the heirs whatsoever of the other ; and the principles on which it proceeds not only exclude its application to a case like the present, where a child of the marriage claims as “ their heir,” but seem necessarily to imply that the existence of such heirs would lead to a contrary result.

*Respondents.*—1. The whole argument of the appellant on the first branch of the case is founded on a loose and inaccurate quotation of the terms of the deed. He says that “ the husband conveyed in distinct and “ unambiguous terms all and haill the just and equal half “ of the lands of Bullshill in the Garth quarter.” But what is conveyed is not the just and equal half of Bullshill ; it is the just and equal half of the nine-shilling-and-ninepenny land in the Garth quarter, being the whole of the four-shilling-and-tenpence-halfpenny land commonly called Bullshill ; and the respondent’s plea

therefore is, that the whole being conveyed to her, and she being infest in the whole (just as much as James Forrester himself was), her feudal title is to stand and cannot be affected by the blunder, whether in fact or merely in words, by which James Forrester is made to speak as if he supposed himself possessed of more than he actually conveyed.

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.

18th Apr. 1835.

Again he argues, that the mention of the amount of valued rent is not taxative, but merely descriptive; and a blunder in regard to it can have no effect upon the substance of the conveyance, which is a conveyance of one half of the lands.

But if James Forrester did make a mistake as to what he meant to convey, it was not a mistake as to the valued rent; for what he conveys is one half of the nine-shilling-and-ninepenny land in the Garth quarter, viz. the lands of Bullshill, which were a four-shilling-and-tenpence-halfpenny land. So that there is as little mistake respecting the valued rent as there is respecting the lands. The only mistake relates to the other half of the nine-shilling-and-ninepenny land in Garth quarter, which forms no part of the subject of conveyance, and it consists in his (apparently) assuming that these other lands did belong to him, contrary to the fact. But this has nothing to do with the present question.

2. The conveyance is of a right of fee and not of life-rent. There is a conveyance, first, of a conjunct life-rent to the spouses, and secondly, of the fee to the longest liver of them, their heirs or assignees. The life-rent is contained in the first member of the clause, by which the granter “dispones and conveys the lands “ to himself and his promised spouse, in conjunct life-  
“ rent during all the days of their lifetime;” and then

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.

13th Apr. 1835.

follows the disposal of the fee, “ and to the longest liver of them,” and “ their heirs or assignees in fee, heritably “ and irredeemably.”

If James Forrester had merely conveyed the lands to himself and his wife in conjunct fee, or in conjunct fee and liferent, the wife’s right, according to established rules of construction, would have been limited to a liferent, while the fee would have been established in the husband’s person exclusively, as the persona dignior of the conjoined parties. But here there is no conjunct fee, nor conjunction whatever of the parties, in so far as relates to the fee. The liferent is given to the spouses conjunctly, but the sole conveyance of the fee is directly to either of them indifferently, whichever should happen to be the survivor of the marriage ;—for the words are, “ and to the survivor of them, their heirs or “ assignees in fee, heritably and irredeemably.”

Cases have no doubt occurred, where there was a conveyance “ to the survivor of the marriage ;” but in all these cases, the conveyance to the survivor did not form the primary and only conveyance of the fee, but was preceded by, and formed merely a sequel to, a conveyance made to the two spouses conjointly, — as, for example, where the words run in some such terms as “ to the husband and wife in conjunct fee (or conjunct “ fee and liferent), and to the longest liver of them, “ their heirs or assignees.”

In all these cases, there is unquestionably a conjunct fee created in favour of husband and wife ; and the only question therefore which arose was, whether the established rule of construction in regard to such rights was to be affected by its being farther carried out by the words, “ and to the survivor of them,” &c. By the

oldest decisions, the general rule as to conjunct fees to husband and wife was adhered to, notwithstanding the addition of these words; but it appearing unwarrantable to obliterate or deny effect to language so unequivocal, and so inappropriate to the constitution of a mere conjunct fee, a different rule has been established by our later practice. Accordingly, Mr. Erskine<sup>1</sup>, after stating the general rule, that “where a right is taken to a husband and wife in conjunct fee and liferent, and the heirs of their body, or their heirs indifferently, the husband is sole fiar, as the persona dignior,” proceeds to say, “but this rule suffers several limitations, all founded on the intention of parties, presumed from the different circumstances of cases;” and, after mentioning various circumstances, and, among others, the importance of the term “assignees” being employed, he adds, with immediate reference to the present subject, “Where the right is taken to the husband and wife, and to the longest liver, and their heirs, the fee is, in the event of the wife’s survivorship, adjudged by our later decisions to belong solely to the wife, to the entire exclusion of the husband’s heirs, as if the right had been granted in the same terms to two strangers. Ferguson, June 22, 1739, Dict. p. 4202. Contrary to the older practice, Justice, 23d Jan. 1668, p. 4228.” With regard to the expression “their heirs,” occurring in the above connexion, Mr. Erskine had previously laid down the general rule of construction thus<sup>2</sup>: “In a right taken to two jointly, and the longest liver and their heirs, the words ‘their heirs’ are understood to denote the heirs of the longest

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.  
13th Apr. 1835.

<sup>1</sup> Ersk. iii. 8, sect. 36.

<sup>2</sup> Sect. 35.

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.  
—  
19th Apr. 1835.

“ liver ; and consequently, though the several shares  
“ belonging to the conjunct fiars are affectable by their  
“ several creditors while both are alive, yet, upon the  
“ death of any one of them, the survivor has the fee of  
“ the whole, exclusive of the heirs of the predeceased.”

The doctrine thus stated was distinctly recognized. In that case the conveyance was <sup>1</sup>, “ To the said John  
“ Murray and Catherine Orthington his spouse, and  
“ the longest liver of them, and their heirs and assignees  
“ whomsoever, heritably and irredeemably.” The case was attended with specialties of a marked description, which induced the Court in the case of *Murray v. Murray* to decide against the right of the widow; but in so doing, their lordships, with the utmost anxiety, placed the judgment upon the specialties of the case, so as to avoid the possibility of disturbing the established rule and practice of the law.

LORD BROUGHAM said :—My Lords, this case turns entirely upon the construction of a clause in a marriage settlement, or rather contract, in the following words :—  
“ In contemplation of which marriage, and in con-  
“ sideration of the sums after mentioned, contracted on  
“ the part of the said Mary Macgregor, the said James  
“ Forrester hereby disposes and conveys to and in favour  
“ of himself and the said Mary Macgregor his promised  
“ spouse, in conjunct liferent, during all the days of  
“ their lifetime, and to the longest liver of them, and  
“ their heirs or assignees in fee, heritably and irredeem-  
“ ably, all and hail the just and equal half of the said  
“ James Forrester’s nine-shilling-and-ninepenny land

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<sup>1</sup> *Murray*, 17 May 1826. S. & D. iv. p. 589. (p. 596, new ed.)



“ of old extent in the Garth quarter, commonly called  
 “ Bullshill, with the houses, biggings, &c., which some-  
 “ time belonging to James Riddoch, who disposed the  
 “ same to Janet Hutton deceased, the said James For-  
 “ rester’s late spouse, and from whom he acquired right  
 “ by his contract of marriage as to the one half; and by  
 “ a disposition from her, bearing date the 29th day of De-  
 “ cember 1780, as to the other half, and upon which titles  
 “ he stands infest.”

FORRESTER  
 v.  
 Trustees of  
 MACGREGOR  
 or FORRESTER.  
 13th Apr. 1835.

Upon the point of the description I have no doubt thereby that Bullshill is treated clearly as a separate tenement, so that the only question is, whether this provision gave the fee to the survivor, whether husband or wife, or only to the husband, with a life-rent to the wife. The Court below held that the wife took a fee by having survived, and I am of opinion that their lordships came to a right conclusion. As in other countries, so in Scotland, considerable nicety has been introduced into the construction of instruments which deal with the fee of estates, while they also deal with a life interest in the same, or, as we should say in England, which at once give a particular estate, carved out of the whole fee, and dispose of the remainder, or that which remains of the fee, upon the determination of the particular estate. The Scotch law regards the interests successively taken as successive fees peculiarly restricted, and not as one estate or interest carved into portions. But one remark is applicable to both systems of jurisprudence, because it arises from the natural course of things in men’s dealing with their property, without having very well-defined ideas of their own intentions. The constructions given by the Courts to certain words are really often much less arbitrary and

FORRESTER  
v.  
Trustees of  
MACGREGOR  
of FORRESTER.

13th Apr. 1835.

refined than they appear to be. The Court is forced to find a meaning where the party has expressed it most obscurely; still oftener where he entertained inconsistent and repugnant intentions, and where we are obliged to choose between the two; or where he only entertained an imperfect or partial intention, and we must supply the defect, so as to further what was his most probable and therefore presumable intentions. The rules of construction thus adopted from necessity are to be regarded as fixed, in order that men's affairs may be governed by known principles, and that the law may be uniform. Of this, the doctrine of the Scotch law, touching settlements or gifts to husband and wife, affords a remarkable illustration. If an interest is given to husband and wife, in conjunct fee and liferent, and to the heirs of the marriage, or to the heirs of their bodies, the latter expression clearly shows that, as far as this marriage goes, the husband's heirs take, and the wife's heirs being his, the fee is in fact his;—at least, there being a necessity to choose which shall have a fee, which both cannot have, and the law not allowing a fee to remain in suspense or abeyance, the husband is preferred, and the fee is vested in him. No violence is done to the words; and the plain intent is followed out as far as it can be without being inconsistent with any other meaning expressed, and with known positive rules of law. But when it is to the parties in conjunct fee and their heirs, their "marriage" being dropped, the heirs of the one are not those of the other party; and as some one must have the fee, the law does not hold this a joint estate, but prefers the husband propter personæ dignitatem. The wife's right, notwithstanding the words "conjunct fee," is reduced to a liferent; and "their heirs," as well as

“heirs of their body,” is read as if it had been the husband’s heirs only,—under certain restrictions in special circumstances, not necessary to be here gone into.

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.

13th Apr. 1835.

Something of the same kind is observable in our doctrine of limitations of estates: where something self-repugnant is to be found in a gift—where the giver, whether testator or settlor, discloses not one plain or consistent intention, but two meanings which cannot both stand,—we must choose between them the best way we can. Mathematicians call this an impossible case; where there is something self-repugnant or contradictory in the different conditions of a problem, and of course they cannot resolve it; but the courts of law are obliged in the affairs of mankind to come as near the prevailing or general intent as they can, and to this they sacrifice the particular intent. Thus an estate to a man for life, and no longer, with remainder to the heirs of his body, is self-contradictory, for there is by one part of the gift an estate for life, and in another an estate tail given to him; and so an estate to a man for life, with remainder to his heirs and assigns, is a fee, because one part being a life estate, and another a fee, we cannot give him both, and must choose by the prevailing and therefore probable intent. The settlement before us is materially different from the ordinary case, of which alone we have hitherto spoken. It is not to the party in conjunct fee, but in liferent only, and to the longer liver, and their heirs or assigns in fee; and the question is, whether or not the rule in the husband’s favour applies here? It is quite plain that we are not driven here, as we might be thought in the former case to be, by the necessity of choosing between two irreconcilable intentions; the whole may in the present instance stand

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.

13th Apr. 1835.

well together. The husband and wife have no conjunct fee given them, and then something to their heirs; but they have a conjunct liferent only, and a fee is given to their heirs and assigns. But in case this should be thought to import a fee to themselves, as if it had been to them in conjunct fee and their heirs, the important words are added, “and to the longer liver of them, “and their heirs.” Now, I think this may, consistently with the rest of the gift, be read “to the parties “jointly for life, and then to the survivor, and that “survivor’s heirs,” which is plainly a liferent to both jointly, and a fee to the longer liver.

The authority of Erskine is quite explicit in favour of this view of the gift. He says, “when “the right is between the husband and wife, and to “the longest liver, and their heirs, the fee is, in “the event of the wife’s surviving, adjudged by our “late decisions to belong solely to the wife, to the “entire exclusion of the husband’s heirs, as if the right “had been granted in the same terms to two strangers, “contrary to the older practice. III., 8, 36.” And he cites, as showing the old practice, the case of Justice in 1668<sup>1</sup>, reported by Lord Stair; and, as showing the altered and modern course of decision, he cites that of Ferguson in 1739.<sup>2</sup> There can be no doubt that this last decision fully bears out Mr. Erskine’s statement. It was the case of a bond to the husband and wife, and the longer liver of them two, “their heirs, executors, “and assigns;” and Lord Kilkerran, who reports the decision, states it to have gone on the force assigned to the words, “the longer liver and their heirs,” which was, he said, read as if it had been to the heirs of the

<sup>1</sup> 23 Jan. 1668; Mor. 4228.

<sup>2</sup> 22 June 1739; Mor. 4202.

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.  
13th Apr. 1835.

longer liver. Nor can we avoid this inference without wholly rejecting these words, "longer liver?"—a violence far too great to be done to such a material expression. But I do not think that the older case of Justice, cited by Mr. Erskine, so satisfactorily proves the old law to have been wholly different on this point. It was a bond to husband and wife, "and the legal heir of them two, and heirs gotten betwixt them, or their assigns, which failing, to the heirs of the last heir;" and it was held to be a fee in the husband, and that the heirs of the marriage were heirs of provision to him, and that failing heirs of the marriage, the wife's heirs were substituted as heirs of tailzie; and they ordered such a disposal of the money as gave the reversion to the wife's heirs and assigns after the decease of the only heir of the marriage. Dirlton, who also observes upon the case, says, that the Lords held the wife had not the fee, but that her heirs took as heirs of provision to the heir of the marriage. The denial of the wife taking any fee is hardly reconcileable with the decision which vested the reversion, expectant upon the only child's life interest, in the assignees as well as heirs of the wife; for what is the interest in a chattel given to assignees as well as heirs other than a fee simple? However, we need not embarrass ourselves with this case, when, even if its import be as Mr. Erskine reads it, we find that of Ferguson so much more clear the other way. Indeed, independent of nice construction on the cases, the plain and unhesitating dictum of Mr. Erskine is of the greatest weight. It stands unimpeached by subsequent decision, it is in strict accordance with the principle which I have stated, and it is contradicted by no principle of law. It therefore must be taken to be sufficient for settling this point.

FORRESTER  
v.  
Trustees of  
MACGREGOR  
or FORRESTER.

13th Apr. 1835.

I have carefully examined the other cases upon these questions, both the older ones and those of a more recent date, and I find nothing inconsistent with the opinion which I have formed. I can find no doubt expressed as to the doctrine of Erskine, and the soundness of the case of Ferguson, except the observation of part of the Court, in the late case of Murray, 1826.<sup>1</sup> That case was not, however, decided on this ground, and Lord Gillies expressly says, that but for the specialty in it the law would have been clear upon the authority of Erskine and of Ferguson's case. The decision must, therefore, be affirmed.

The House of Lords ordered and adjudged, That the said petition and appeal be, and the same is hereby dismissed this House, and that the Interlocutor therein complained of be, and the same is hereby affirmed.

THOMAS DEANS—ALEXANDER DOBIE—Solicitors.

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<sup>1</sup> 17th May 1826 : 4 S. & D. p. 589, (New Ed. p. 596.)

[15th April 1835.]

**Sir WINDHAM CARMICHAEL ANSTRUTHER** of Anstruther and Carmichael, Baronet, Appellant. — *Sir John Campbell — Murray.*

**Mrs. MARIAN ANSTRUTHER**, Spouse of James Anstruther, Esq., Writer to the Signet, Respondent. — *Lushington — Bruce.*

*Succession—Collation.* Question remitted for farther consideration to the Court of Session, whether an heir succeeding to entailed estates as heir substitute by the death of a preceding heir is entitled, as one of the nearest of kin of the deceased, to participate in his moveable succession with another of the nearest of kin, without collating the entailed estates.

**JOHN**, third Earl of Hyndford, by a deed of entail, dated October 27th, 1757, and recorded in June 1762, entailed the estate of Carmichael and others upon himself and the heirs male of his body ; whom failing, a variety of substitutes; “ whom failing, Sir John Anstruther of Anstruther, baronet, only son in life procreated of the marriage betwixt the deceased Sir John Anstruther of Anstruther, baronet, and the also deceased Lady Margaret Carmichael, his wife, my eldest sister ; whom failing, Philip Anstruther, eldest son of the said Sir John Anstruther, and the heirs male of his body ; whom failing, John Anstruther, second son of the said Sir John Anstruther, and the heirs male of his body ;” whom failing, a variety of substitutes.

2d DIVISION.

Lord Medwyn.

ANSTRUTHER  
v.  
ANSTRUTHER.

15th Apr. 1835.

The Earl of Hyndford having executed a trust deed, his trustees, by a separate deed of entail, dated in June 1791, and recorded in 1820, settled the lands and barony of Mauldslic upon Thomas Earl of Hyndford, then heir in possession of the estate of Carmichael under the Carmichael entail; whom failing, a variety of substitutes; whom failing, to Sir John Anstruther of Anstruther (the appellant and respondent's grandfather); whom failing, to Philip Anstruther, the eldest son of Sir John, and the heirs male of his body; whom failing, to John Anstruther (the appellant and respondent's father), second son of Sir John Anstruther; whom failing, to the other heirs substitute called by the Carmichael entail, and under the same limitations as contained in that entail.

Sir John Anstruther of Anstruther also, by a deed of entail, dated February 18th 1778, and recorded in March 1778, settled the lands and barony of Anstruther and others in strict entail upon himself in liferent, and Philip Anstruther, his eldest son, and the heirs male of his body, in fee; whom failing, John Anstruther (the appellant and respondent's father), and the heirs male of his body in fee; whom failing, a series of substitutes.

Sir John further executed two separate trust deeds in 1793 and 1794, by which he conveyed certain lands to trustees to pay off his debts, and to entail the residue of the trust estate upon the same heirs, and under the same conditions and limitations, as in the deed of entail of the estate of Anstruther. The trustees accordingly executed a deed of entail in 1811 and 1812, and recorded in 1813, by which they entailed the lands of Newark and others upon Sir John Carmichael Anstruther, the appellant's elder brother, and the heirs



male of his body ; whom failing, the appellant and the heirs male of his body ; whom failing, the substitutes called after them by the entail of Anstruther.

ANSTRUTHER  
v.  
ANSTRUTHER.

15th Apr. 1835.

In consequence of the death of Sir John Anstruther in 1811, and the death of Lord Hyndford in 1817, and the failure of intermediate heirs, Sir John Carmichael Anstruther, the appellant's eldest brother, succeeded to the estates of Carmichael, Mauldslie, Anstruther, and Newark.

He died on the 28th of January 1818, and was succeeded by his son, a posthumous child, the late Sir John Carmichael Anstruther.

Sir John was born on the 6th of February 1818, and died in pupillarity on the 31st of October 1831, at Eton, where he had been placed at school. It was admitted that both he and his father were domiciled Scotsmen. He left, besides the entailed estates, a very large moveable succession, the greater part of which, amounting to more than 60,000*l.*, arose from the accumulated savings of the rents and profits of the entailed estates.

The appellant, Sir Windham Carmichael Anstruther, upon the death of his nephew succeeded and made up titles as heir of entail to the estates of Carmichael, Mauldslie, Anstruther, and Newark under the entails above mentioned.

He and his sister, Mrs. Marian Anstruther, were the nearest in kin of their nephew ; and a question having arisen as to the right of the appellant to participate in the moveable succession, Mrs. Anstruther and her husband presented a petition to the Court of Session, praying their lordships “ to sequestrate the “ whole funds and effects belonging to the said deceased “ Sir John Carmichael Anstruther at the time of his

**ANSTRUTHER** “ death, arising from savings during his pupillarity,  
v.  
**ANSTRUTHER.** “ and, in particular, the whole property as specially  
 15th Apr. 1835. “ detailed in the foregoing petition, with all interest  
 “ due thereon, with the exception of a certain por-  
 “ tion thereof invested in Government securities.”  
 Their lordships accordingly awarded sequestration,  
 and appointed a judicial factor on the 24th of De-  
 cember 1831.<sup>1</sup> With the view of more fully vesting  
 in the factor’s person a title to the executry funds, Mrs.  
 Anstruther, with his approbation, obtained herself  
 decerned and confirmed executrix dative quà one of  
 the nearest in kin to her nephew, and granted to the  
 factor an assignation of the whole funds so confirmed;  
 and with the same view the appellant disposed to the  
 factor such of the executry funds as were vested upon  
 real securities pending the nephew’s pupillarity. There-  
 after the factor instituted a process of multiplepoinding,  
 to have the respective rights of the parties to the funds  
 in his possession decided.

In this process the appellant claimed to be preferred  
*pari passu* with his sister to the whole fund in medio, on  
 condition of collating the heritage, including heirship  
 moveables to which he had succeeded by fee-simple titles,  
 but not the estates to which he had succeeded as heir of  
 entail, particularly the estates of Carmichael, Maukdslie,  
 Anstruther, and Newark.

In support of this claim he maintained that when the  
 heir is also one of the next of kin, and the succession of  
 the deceased consists partly of heritage and partly of  
 moveables, the heir is entitled to the benefit of collation,  
 or to draw a fair and equal portion of the executry along

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<sup>1</sup> 12 S., D., & B., 185.

with the other next of kin, if he shall collate and throw into the executry, as a common fund, such of the heritage as he takes as heir of line of the deceased, whether he takes it ab intestato, præceptione hæreditatis, or under a disposition granted mortis causâ merely.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

2. That in order to entitle the heir to the benefit of collation he is not bound to collate or throw into the common fund such heritable estate, though vested in the deceased, as was held by the deceased and is succeeded to by the heir under a strict entail executed by some third party; nor was he bound to do so even where the entailed destination coincides with the line of succession at common law. And,

3. That particularly the heir, in order to have the benefit of collation, is not bound to collate or throw into the common fund such estate, though vested in the deceased, as was held by the deceased and is succeeded to by the heir under a strict entail in favour of heirs male, or any other destination inconsistent with and exclusive of the ordinary line of descent at common law.

On the other hand the respondent claimed to be preferred to the whole of the executry of which her nephew died possessed, wherever situated or however constituted, unless the appellant should collate with her his interest in the entailed estates to which he had succeeded as heir of line and of tailzie.

The Lord Ordinary having reported the question on Cases to the Court, their Lordships pronounced this interlocutor: “ The Lords, on report of Lord Medwyn, “ Ordinary, having considered the Cases for the parties, “ and whole proceedings, find, That, in this process of “ multiplepointing, the claimant, Sir Windham Carmichael Anstruther, cannot claim any share in the

ANSTRUTHER v. ANSTRUTHER. “ executry of the late Sir John Carmichael Anstruther,  
 15th Apr. 1835. “ without previously collating the heritage, to which, as  
 “ heir of Sir John, he has succeeded : Find Mrs. Marian  
 “ Anstruther and her husband entitled to expenses of  
 “ process ; and remit to the Lord Ordinary to proceed  
 “ accordingly.”<sup>1</sup>

Sir Windham appealed.

*Sir John Campbell for the Appellant* :—This case involves a point which comes before your lordships for the second time. It was agitated in the year 1795 in the Scotstarvit case, and your lordships reversed the interlocutor of the Court of Session. By that interlocutor it was found that a person under circumstances somewhat the same as the appellant was bound to collate entailed property before he could take a share in personalty. When the case came to this House the judgment was rested upon a specialty, and therefore, as far as your lordships are concerned, the general question is quite entire ; nor until the year 1809 was there any decision upon it in the Court below that could be quoted against us.

We contend that when the heir is also one of the next of kin, and the succession of the deceased consists partly of heritage and partly of moveables, the heir is entitled to the benefit of collation, if he shall throw into the executry, as a common fund, such of the heritage as he takes as heir of line, whether he takes it ab intestato, præceptione hæreditatis, or under a disposition granted mortis causâ. But we also contend that

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<sup>1</sup> 12 S., D., & B., 140.

the heir is not bound to throw into the common fund such heritable estate as was held by the deceased, and which is succeeded to by the heir under a strict entail executed by some third party; and that this applies even where the entailed destination coincides with the line of succession at common law.

ANSTRUTHER

v.  
ANSTRUTHER.

15th Apr. 1835.

The rule which is contended for on the opposite side is, that the heir of line must not only collate what he takes as heir of line, such as fee-simple lands or heirship goods, and such as he takes either by the bounty of the deceased in his lifetime or by the disposition of the law, but that he must collate his interest in the entailed estates, which he does not take as heir of line, but which he takes as heir of entail.

It is in short maintained by the respondent, that the appellant is bound to collate what he takes quâ heir of entail, although it is allowed that if he were next of kin and were heir of entail he is not bound to collate, unless he were likewise heir of line.

This seems a very extraordinary doctrine, and would require very strong authorities to support it. Collation proceeds from equitable considerations, and the object is, not to make all who are to take equal sharers of the personalty, but to provide for an equal distribution of the property of the deceased among the next of kin. For that purpose you must take care that that which is brought into the common fund was the property of the deceased; you are not to take the property of a stranger which has come into the possession of any of the next of kin, because that would be to make inequality in the distribution of the property of the deceased. But where there is a strict entail the tenant in tail has not the property; nominally he is the fiar, because the

**ANSTRUTHER** fee cannot be in abeyance, but substantially he has a  
<sup>v.</sup>  
**ANSTRUTHER.** mere life interest; he is in the same situation as if  
 15th Apr. 1835. there were a succession of life estates, and he cannot prevent the next heir substitute from taking under the entail. His creditor cannot adjudge the fee; he has no power over the fee either during his life or *ex mortis causâ*. Sir Windham Anstruther is the heir of entail; he is likewise the heir of line; but he has liabilities and he has rights in one capacity that are perfectly distinct from those he has in another. As heir of line he is entitled to the fee-simple lands of his nephew, to the heirship moveables; and if he seeks to have a share of the personalty as next of kin, he must bring these into the common fund. But his character of heir of entail is quite distinct; it is as heir of entail, and not of line, that he takes these entailed estates; he takes them *per formam doni*; not by any disposition of his nephew, not by blood, but by a singular title as a purchaser or as a creditor.

Now, as those entailed estates never were the property of the nephew, it does seem contrary to all equity, and to the principle of collation, to say, that in distributing the personal estate you should bring into the common fund that which never did belong to the nephew.

By the Roman, and also by the old law of Scotland which existed before the feudal law was established, all the next of kin, whether any of them were what has been since called heirs of line or not, were entitled to an equal share of the personal estate of the deceased. Collation is a burden superinduced upon the heir,—a character favoured by the law, and therefore the rule by which he is called upon to collate ought not to receive a very strict construction. If the heir of line be sole next

of kin he takes the whole of the personalty; therefore his being heir of line is no disqualification to claim as next of kin; but where there are two who are next of kin, one of them being heir of line, the heir has the same right in that case to a moiety as in the other case he has to the entirety.

ANSTRUTHER  
v.

ANSTRUTHER.

15th Apr. 1835.

It has also been decided, that if the heir of line is not one of the next of kin he is not entitled to any share of the executry. That is laid down by Mr. Erskine in his Institutes, and was decided in the case of M'Can v. M'Can.<sup>1</sup> It is therefore not as heir of line that he takes a share of the executry, but it is in his character of next of kin. Indeed there is not only collation between the heir of line and the next of kin, but there is collation among the next of kin; for if one of the next of kin has been advanced by the deceased, then there must be collation. In like manner, as to collation between the heir of line and the next of kin, it is as next of kin that the heir claims a share of the personal estate, and collation is merely a condition imposed upon his right as next of kin, and it is in his quality of next of kin that he has a right to make the demand. If this be so, the foundation of the doctrine which was established by the Little Gilmour case utterly falls, for that decision proceeded entirely upon this foundation, that the heir of line had no right to claim a share of the personal estate quæ next of kin; that as heir of line he was cut off from all share of the personal estate, which was considered as the portio legitima of the younger children, while the portio legitima of the heir of line was the real estate, and therefore he could make no

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<sup>1</sup> Morrison's Dict., 2883.

**ANSTRUTHER** claim as next of kin in respect of the personalty,  
v.  
**ANSTRUTHER.** which he must purchase by collating. But what we  
 15th Apr. 1835. contend for is, that although the price is collation, it is collation of what he takes as heir of line, and not what he takes from a stranger under a will. He is to collate the heritage. But what is the heritage? The heritage is what he inherits as heir of line from his ancestor; that over which his ancestor had a control, of which his ancestor could have deprived him, to which he has succeeded by virtue of blood, or to which he is indebted from the bounty of his ancestor. But how can this apply to the interest he takes in an entailed estate?

We allow that every thing should be considered as heritage of the deceased which his creditors could after his death attach, but that nothing can be considered part of his estate in which he had no interest beyond his life, and which after his death is taken by others, not as his proper representatives, but under a right altogether independent of him.

But the heir of entail is considered a mere stranger to the person to whom he succeeds. He is not liable for the general debts of the deceased; he is liable only for the debts which attach upon the entailed estate. It is the property of the deceased which is to be distributed. But the entailed estate is not his property or heritage.

Take another view:—Collation may be considered as if it were waiving the law of primogeniture, and making the real estate equally divisible as if it were personal estate. Can the heir of line be called upon to do more than waive his right of primogeniture?

Such are the general principles upon which it seems to us that this case is to be decided; and until we come to the year 1795, when the Scotstarvit case was decided



by the Court of Session, I can find nothing in the law of Scotland, not in perfect accordance with those principles.

ANSTRUTHER  
v.  
ANSTRUTHER.

15th Apr. 1835.

I now proceed to refer to some passages from the old writers, to show the distinction between heir of line and heir of entail; that the heir of entail, as such, is considered as a stranger; and that what was to be contributed was only what the heir of line took in that capacity. (He then referred, in support of the distinction between the heir of entail and of line, to 3 Stair 5. 8. and Dirleton's Doubts, voce Heirs of Tailzie.)

To prove what according to the old law of Scotland was considered to be the subject of collation, I refer to Balfour's Practices, p. 233, where he says, " Item, na  
" person succidand as heir to his father or predecessour's  
" lands and heirschip gudes aught and suld have ony  
" part of ony remanent moveabil gudes or geir whilk  
" pertained to his father or predecessour the time of  
" his deceis, except he would cast in and confer his  
" hail heirschip gudes with the rest of the said hail  
" moveabil gudes and geir altogether, that equal partage  
" might be made thereof betwixt him and the rest of  
" the bairns." The " equal partage " is to be of the property of the father, and of what is taken as heir; clearly meaning as heir of line, such as heirship moveables; not what he takes from a stranger.

Lord Stair in his Institutes (B. 3. t. 8. s. 48.) says :—  
" Heirs are excluded from the bairns part, though in  
" the family, because of their provision by the heritage,  
" except in two cases: First, if the heir renounce the  
" heritage in favour of the remanent bairns; for then  
" the heir is not to be in a worse case then they, but

ANSTRUTHER v. ANSTRUTHER. “ they come in *pari passu*, both in heritable and moveable rights, which is a kind of *collatio bonorum*.”

15th Apr. 1835. By the term heritage we contend that Lord Stair means that which comes to the heir of line, and not what is taken *per formam doni*.

Sir George Mackenzie in his *Institutes* (B. 3. t. 9. s. 11.) thus lays it down :—“ But the heir has no share in the moveables, except he collate, and he consent that the rest of the children share equally with him in all that he can succeed to as heir.” But can there be the smallest doubt that Sir George Mackenzie here uses the term “ heir ” as meaning heir of line ? If the words “ heir of line ” had been here introduced, it would have been an express authority.

The next passage is from Dirleton’s *Doubts*, under the head “ Heirs of Tailzie.” “ *Quæritur*, if there be no heritable estate belonging to an heir of line out of which the executor may be relieved of heritable debts, will the heir of tailzie be obliged to relieve the executor of such deeds ? ” “ *Ratio dubitandi* heirs of tailzie are not properly heirs, but *bonorum possessores*, and liable to debts only in *subsidium* ; whereas the heirs of line and executors are properly heirs ; and the heir of line, if the executry be great, and more considerable than the heritable estate, may confer,” (that is, collate,) “ which is not competent to the heir of tailzie or provision.”

Bankton (vol. 2. p. 385.) applies the doctrine of collation only to the heir of line. He says, “ Where the eldest son succeeds as heir he cannot claim any interest in the executry, either as a share of dead’s part or legitim, because in such case the succession divides, and the heritage goes to the eldest son with

“ the burden of the heritable debts, and the executry  
 “ to the younger children with the burden of the  
 “ moveable. But, as the eldest son is still one of the  
 “ nearest in kin with his brothers and sisters, he may  
 “ claim in that character a share of the whole execu-  
 “ try with them, upon collation or contribution of the  
 “ heritage, both what he succeeds to after his father’s  
 “ death and what he got disposed to him before, per-  
 “ ceptione hæreditatis, so as the whole subjects of the  
 “ succession may be equally divided among them all ;  
 “ and which holds in all cases where the heir is in the  
 “ same degree of relation with the executors ; but other-  
 “ wise he cannot be admitted, even though he were  
 “ willing to collate, since he is not vested with the  
 “ character of nearest in kin, and so cannot claim as  
 “ such.” This is plainly confined to the heir of line,  
 and to the case in which the heir of line takes in that  
 capacity, and it is the property of the father which is to  
 be collated, not that derived aliunde.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

The last written authority upon the subject is  
 Mr. Erskine. In book 3, t. 9, s. 3, where it is  
 thus laid down :—“ It is only the legal heir, or the  
 “ heir ab intestato, who is thus obliged to collate the  
 “ heritage with the other next of kin, in order to have  
 “ the benefit of the moveable succession.” By “ the  
 “ legal heir, or the heir ab intestato,” he clearly means  
 the heir at law—the heir of line. He then goes on :—  
 “ Where, therefore, in the case of daughters only the  
 “ heritable estate is settled on the eldest by entail or  
 “ destination, she is entitled upon her father’s death to  
 “ her first share of the moveables with the other daugh-  
 “ ters without collating that estate ; for she succeeds to  
 “ the heritage by provision of the father, who had

ANSTRUTHER “ full power over it, and that provision can in no degree  
 v.  
 ANSTRUTHER. “ affect the moveable estate, which by the legal succes-  
 15th Apr. 1835. “ sion descends equally to her and her younger sisters.”

Now if it had been the ancient law of Scotland that the heir of line was obliged to collate, not only what he takes as heir of line, but what he takes as heir of tailzie, would there have been nothing of that kind to be found in Balfour, or in Bankton, or in Dirleton, or in Stair, or in Erskine? Yet there is not a trace of it to be found. All that they say is, that there shall be a collation by the heir of all which he takes as heir, for the purpose of regulating the succession of the property of the defunct. According to them, therefore, that which is to be brought into the common fund must have been the property of the defunct; and it is impossible to say that the entailed property ever was his.

Such being the text writers upon the subject, I will now bring to your lordships notice all the cases (and they are not many) which have been decided in the Scotch Court upon the law of collation.

[He then referred to the cases reported in the Dictionary under the head “ Collation,” till he came to the case of Scott.<sup>1</sup>] This is the Scotstarvit case, a case in which this House reversed the decision of the Court below, and a case which is allowed by Lord Meadowbank, in the Little Gilmour case, to have been improperly decided in the Court below with regard to the doctrine of collation,—a case therefore entitled to no authority whatsoever; and till we come to the Little Gilmour case, (a case which I contend is not law, which was not appealed, which was merely the opinion of one Division

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<sup>1</sup> 15 Nov. 1787, Mor. 9379.

of the Court of Session, without consulting the judges of the other,) there is no decision which can be considered as against us.

ANSTRUTHER  
v.  
ANSTRUTHER.

15th Apr. 1835.

In the *Scotstarvit* case, the Court of Session, forgetting the well-known rule, that with regard to the succession to personal property the rule depends upon the law of domicile, held that it depended upon the place where the person died; and displacing the case of *Ricarts*, in 1720, decided, that “heirs alioqui successuri” or not, and whether *ab intestato* or *provisione hominis*, “must collate in order to claim any share of the moveable succession.”

There was an appeal by both parties. The question as to the general obligation of the heir of entail to collate was very learnedly argued in the papers on both sides, and I believe at your lordships bar. It was decided by Lord Thurlow, who made a speech upon that occasion. There is a traditionary account of it; but I do not feel at liberty to state the purport of it. Though we have been most anxious, and it would have been a most desirable thing for us, to obtain some notes of the speech of that learned lord, we have not been able. There were not at that period the very satisfactory means we now have of knowing what falls from the learned lords who advise your lordships House in the adjudication of appeals. We have not been able to obtain any account of Lord Thurlow’s speech; but this we know, that the appeal of the next of kin was dismissed, and that the decree whereby it was held that Miss Scott was not entitled to her share of the personal property in Scotland was reversed. Now I allow that an abundant reason for reversing must have struck Lord Thurlow the very moment the case was opened to this House, seeing the error which had been committed as to the law of

**ANSTRUTHER** domicile. It was necessary to go no farther than to see  
**ANSTRUTHER.** that the Court of Session had proceeded on a wrong  
 15th Apr. 1835. foundation when they made the distinction between the  
 personal property of David Scott situate in England  
 and the personal property of David Scott situate in  
 Scotland, for they were both governed by the law of the  
 country where he was domiciled.<sup>1</sup>

The next case is that of *M'Can v. M'Can*<sup>2</sup>, in which  
 it was held, that an heir "cannot insist for collation if  
 " he be not at the same time one of the nearest in kin."  
 And this I make use of to fortify my position, that where  
 the heir of line does claim a part of the personal estate,  
 being next of kin, he does it in his capacity of next of  
 kin, and not as heir at law.

The next case, and which was the last before the  
 Little Gilmour case, was that of *Crawfurd v. Stuart*,  
 which was decided in the year 1794<sup>3</sup>, the *Scotstarvit*  
 case having been decided in this House in the year  
 1793. In this case of *Crawfurd* it was decided, that  
 " an heir of entail who is one of the nearest in kin, and  
 " not the heir *alioqui successurus*, is entitled to a share of  
 " the moveable succession without collating;" and I am  
 surprised to find that this is a case the other side rely  
 upon. I rely upon it, and do so very much; for there  
 it was held, that an heir of entail being one of the

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<sup>1</sup> The judgment of the House of Lords, as given in the Faculty Col-  
 lection and in Morrison's Dictionary, is incorrect. The words of the  
 judgment are these: " That the said Henrietta Scott is entitled to claim  
 " her distributive share in the whole personal estate of her uncle, David  
 " Scott of Scotstarvit, in Scotland, without collating his heritable estate,  
 " to which she succeeded as heir, in so much as she claims the said share  
 " of the said personal estate by the law of England, where the said David  
 " Scott had his domicile at the time of his death." Journals of House of  
 Lords, 11 March 1793; 1 Bell, 103.

<sup>2</sup> 28 Nov. 1787, Mor. 2383.

<sup>3</sup> 3 Dec. 1794, Mor. 2384.

nearest of kin has a right to a share of the personal estate without collation.

ANSTRUTHER  
v.  
ANSTRUTHER.

15th Apr. 1835.

These are all the decisions till we come to the Little Gilmour case<sup>1</sup>; and although I might distinguish in several respects the present one from the Little Gilmour case, we certainly do deny the Little Gilmour to be law, and we call upon your lordships to overturn it. It is contrary to all the authorities, and to all the principles that have before prevailed in the law of Scotland; and it is entitled to the less weight for this reason, that although the case was of much magnitude it was decided by one Division of the Court, without the other judges being consulted. It was between near relatives, who might have a reluctance to continue the litigation, and it was acquiesced in. The facts were very few: “Walter  
“ Little Gilmour, of Libberton and Craigmillar, died  
“ intestate, leaving two infant children, the parties to  
“ this action. Mr. Gilmour’s succession consisted of  
“ two large estates descending to the heir male under  
“ two old and very strict entails, of a small herita-  
“ ble property which had been vested in himself in  
“ fee simple, and a considerable moveable property.  
“ Upon his death it became necessary to try the  
“ question, whether the son was entitled to a share of  
“ the moveable property without collating the entailed  
“ estates.” The entails are not set out. I believe that they were made by a direct ancestor of the claimant; and that circumstance your lordships will find seems to have influenced the opinion of the judges, although it appears to me quite immaterial whether the entail was made by an immediate ancestor, or whether it was by a collateral relation or a stranger. The case being argued, judg-

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<sup>1</sup> 13 Dec. 1809, Fac. Coll.





heir ; and he does not tell us what is to become of collaterals, when you have not the elder son and the children. He then says, “ That those estates were totally  
 “ separate and distinct in questions of succession. That  
 “ by the common law the heir had no more right to the  
 “ share of the younger children, to any part of the  
 “ portio which the law assigns them, than they have to a  
 “ share of what is peculiarly appropriated to the heir.  
 “ That this was the most natural view of the case.”  
 (Again I ask, What is meant by the “ natural view of the  
 “ case?”) “ That on feudal principles the heir was the  
 “ favorite of the law.” If so, the heir is very hardly  
 used here, for although he is one of the next of kin he  
 claims a share of the personal property without collating  
 what he takes under the entail : it is no great favoritism  
 to compel him to collate what he takes as heir of entail.  
 His lordship then says, “ That it naturally followed  
 “ from this favor which was shown to the heir or eldest  
 “ son, that if the heritage was less valuable than a share  
 “ of the moveable property would be he should get a  
 “ share of the moveable property, if he chose to demand  
 “ it, in order, at all events, to prevent his being left in a  
 “ worse situation than the younger children. That  
 “ this proceeded, not from any idea that in neglecting to  
 “ collate he surrendered his share of the moveables, for,  
 “ strictly applied, the law would have given him more,  
 “ but entirely from the favor which the feudal institu-  
 “ tions have always shown to the eldest son. But at  
 “ the same time, as he thereby encroached upon what  
 “ was the share of the nearest of kin, it was but right  
 “ that he should in return give them a share of his own ;  
 “ but in doing so it was only the portio legitima which  
 “ he was bound to collate ; not any property which

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER v. ANSTRUTHER.  
 15th Apr. 1835.

“ he might have acquired from other quarters. That  
 “ this being the general principle of the law, the next  
 “ enquiry was, in what manner was that principle  
 “ affected by particular destinations of property. And,  
 “ first, as to this his lordship thought that in general,  
 “ where there was both an heir and nearest of kin, and  
 “ the heir took the estate by particular but simple des-  
 “ tination from the ancestor, then, whatever might be  
 “ the destination of the estate, still the heir must collate,  
 “ if he claims a share of the moveable succession ; for  
 “ this plain reason, that he is asking a share of the portio  
 “ legitima appropriated to the executors, and that if he  
 “ avails himself of the favor which the law allows him  
 “ he must pay the price which the law requires. This  
 “ was the first and simplest case of collation.”

“ Secondly,” his lordship said, “ that where there was  
 “ no heir male, or no only daughter, but several heirs  
 “ portioners, a different rule would necessarily take  
 “ place. In such a case the eldest daughter is no fa-  
 “ vorite of the law.” (It is very odd that the eldest  
 “ daughter, being no favorite of the law, is not bound to  
 “ collate, but that the eldest son, being the favorite of  
 “ the law, is bound to collate.) “ Both heritable and  
 “ moveables are thrown into one mass, and both form  
 “ the common portio legitima of all the daughters.  
 “ Accordingly, where the eldest daughter has received  
 “ an estate destinatione, she has rightly been found not  
 “ bound to contribute any share of it when she claims  
 “ her equal share of the remainder, because what re-  
 “ mains is the common portion, and it cannot be  
 “ argued, on her receiving by destination from a person  
 “ entitled to bestow it an estate to which she had other-  
 “ wise no exclusive right, that she should therefore lose

“ what she would have otherwise had a right to as her  
 “ legal portio. She takes what is specially bequeathed  
 “ to her as a stranger would; not as a male heir, that  
 “ takes what would at any rate have been his own  
 “ exclusively. That perhaps, however, on more subtle  
 “ views, it might be maintained that one was bound to  
 “ collate to a certain extent, but not in the same mea-  
 “ sure as an heir male alioqui successurus.” (His lord-  
 ship evidently has the case of Riccart or Riccart in  
 view, in which it was held, that the eldest daughter,  
 taking a share of the moveables, was entitled without  
 any collation.) “ Thus, if there are three heirs por-  
 “ tioners, and one of them gets the whole of the heri-  
 “ table property destinatione, while the moveable estate  
 “ remains subject to the common operation of the law,  
 “ in such case it might be argued, that if she claimed  
 “ a share of the moveables she must collate one third  
 “ of the heritable property, because to that extent she  
 “ was the heir alioqui successurus, while, as to the other  
 “ two thirds, which she received tanquam quilibet, she  
 “ could not be bound to collate them. That this  
 “ would perhaps be the most nice and subtle view of  
 “ the case; but the plain and obvious answer would  
 “ be that already noticed, which was given in the case  
 “ of Riccart, that the eldest daughter is as well entitled  
 “ to take the whole tanquam quilibet, if the ancestor  
 “ chooses to give it her, as a stranger would have been,  
 “ if he had given it to him, which he might have  
 “ done, and that the remainder of the property just  
 “ continued to be what it had always been, the portio  
 “ legitima of the whole of the heirs portioners, and as  
 “ such subject to division among the whole.” Here  
 again his lordship relies upon this notion, which was

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER <sup>v.</sup> ANSTRUTHER. 15th Apr. 1835. certainly only his own notion, that entail property was the portio legitima of the heir at law, or that the real estate taken by the heir of line is the portio legitima of the heir, and accordingly this formed the argument in the case of Riccart, an argument which does not apply in the case of a male heir of line, because the moveables are not part of his portio legitima. He then proceeds—" We are not bound ex lege to produce an equality among the heirs, but only to give effect to what is clearly the meaning of the law. On the other side they seem to contend that the object is to create an equity among the heirs, and not merely to make distribution of the property of the deceased. The eldest daughter in the case supposed, which was just that of Riccart, was entitled to say that she could not be forfeited of nor bound to collate her own third, merely because a person who had a right to do so had given her more than her own share ; just in the same manner as if the dead's part had been left to the heir, in which case he would take it tanquam quilibet, and could not on that account be compelled to renounce a share of the heritage. But this don't touch the present question, which is not the case of an heir taking tanquam quilibet, but directly the converse."

His lordship then goes on to say, that " a third case was, where an heir had succeeded to the heritable estate by singular titles. That our predecessors, in Murray v. Murray, found that an heir was bound to collate what he got from the ancestor whose moveables were in question, because it was a part of the estate which he would have succeeded to ex lege ; the one was in some measure the price of the other, and unless he collated he could claim no share of the

“ moveables. That though it was clear that a man who  
 “ gets an estate from a stranger by singular titles  
 “ could not claim a share of his moveables, on an offer  
 “ to collate, still it would never follow that a man who  
 “ gets his own estate by singular titles should thereby  
 “ be deprived of his natural and inherent right to col-  
 “ late it, if it should appear to him to be most advisable  
 “ to claim a share of the moveables. That therefore the  
 “ case of Murray was rightly decided.” (So far I  
 readily assent to the reasoning of the learned judge.)

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1895.

“ Fourthly,” his lordship said, “ that the last case was  
 “ the case now under consideration, where a man gets  
 “ an estate, not only by singular titles, but under tram-  
 “ mels imposed by his ancestors, which, if matters had  
 “ been left to the common operation of the law, would  
 “ have descended to him in fee simple from his own  
 “ father, whose moveable succession is disputed, but  
 “ which trammels he must submit to, under the pain of  
 “ incurring a forfeiture, or of being found liable in  
 “ damages. His own ancestors have imposed these re-  
 “ strictions.” (Here the learned judge seems to rely  
 upon the peculiarity of the case, that the Liberton estate  
 and the Craigmillar estate had descended from the im-  
 mediate ancestors of the claimant, and that the entail  
 was not by a stranger.) “ There may,” he continues,  
 “ in one view be a hardship; but if he can get his  
 “ estate upon no other terms, is he entitled to complain  
 “ that he is not put into a better situation than he  
 “ would have been in if they had not been imposed,  
 “ and to put his sister in a worse situation than she  
 “ would have been, in consequence of restrictions and  
 “ prohibitions directed, not against her, but against  
 “ himself? He has got his own portio legitima, the

**ANSTRUTHER** “ portio which the law would have given him if it had  
v.  
**ANSTRUTHER.** “ been left to its own operation ; and must he not con-  
15th Apr. 1835. “ tribute that if he asks a part of the portio legitima  
“ of his sister ? That the burdens on the estate may be  
“ a hardship on the heir in one sense, but that if they  
“ are so, at any rate they are beneficial hardships, for  
“ they have secured it to him. They have not taken it  
“ away ; it is still the heir’s portio legitima ; and if he  
“ refuses to contribute it, burdened as it is, he expressly  
“ admits that it is more valuable than that which he is de-  
“ manding from the executor ; and therefore it would be  
“ most unjust to listen to his claim, which would clearly  
“ be at variance with the original view of the law in  
“ introducing the practice of collation. That, in short,  
“ it was impossible to see the principle upon which the  
“ heir of an estate, who is absolute fiar, even where he  
“ does receive it under burdens, can pretend to hold it  
“ on a principle radically different from what he would  
“ hold any other estate. That on these grounds the  
“ heir of an entailed estate which would have been his  
“ ex lege if there had been no entail, that is, the heir  
“ of line of the last possessor, was bound to contribute  
“ that estate if he wished to take a share of the move-  
“ ables.” (All this reasoning proceeds upon the sup-  
position, that, according to the destination, an entailed  
estate is always to go to the heir of line ; but it may  
go according to any other devolution.) “ That the  
“ argument which the claimant maintained, that he  
“ had no power to collate, was one of no force what-  
“ ever ; that if he really could not collate, then he  
“ could not perform the only condition on which  
“ he could claim the moveables ; and the restric-  
“ tions of the entail were meant to fetter him, and

“ not the executors. But that in truth there was  
 “ nothing to prevent him from collating; that he might  
 “ collate the value, or he might collate the rents; that  
 “ the latter might be evicted, and why could they not  
 “ be collated?

ANSTRUTHER  
 v.

ANSTRUTHER.

15th Apr. 1835.

“ That the answer made by the heir, that he did not  
 “ take as heir of line, but in virtue of a gift from the  
 “ predecessor, was also insufficient. It is very true that  
 “ it does so; but upon the principles of the law of col-  
 “ lation, already explained and illustrated, still the estate  
 “ which he takes is his portio legitima.” The learned  
 judge comes at last to grapple with that objection, that  
 the heir did not take as heir of line, but in virtue of a  
 gift from his predecessor. How does he grapple with  
 it? He allows the premises, but he says, “ still the  
 “ estate which he takes is his portio legitima.” So that  
 the learned judge says,—for that is his notion,—that an  
 entailed estate may be the portio legitima; but that is  
 only his own notion, for which there is no ground. “ It  
 “ is the price (he says) which the law commands him  
 “ to pay if he takes a share of the portio legitima be-  
 “ longing to the executors.” That is a gratis dictum of  
 the learned judge; he does not state any one text of a  
 single writer or any decision for this principle. He then  
 goes on: “ And unless he chooses to sacrifice the one,  
 “ such as it is, he cannot be permitted to touch the  
 “ other. That neither could a man get out of the  
 “ difficulty by lying out unentered in the entailed estate.  
 “ He was not entitled to do so. He must convey his  
 “ right in his own legitima portio to the executors, be  
 “ it what it may, before he can claim any part of the  
 “ executry, which the law declares to belong exclusively  
 “ to them. On these grounds his lordship was for

ANSTRUTHER “ deciding in favor of the executors, and concluded  
 “ his remarks by observing, that he had no difficulty in  
 15th Apr. 1835. “ saying that the case of Scotstarvit was wrong decided  
 “ in this Court, even independent of the specialty which  
 “ had produced the alteration by the House of Lords ;  
 “ for Miss Scott was an heir portioner, and as such  
 “ would not be bound to collate any part of the heritable  
 “ estate, which she acquired either *tanquam quilibet* or  
 “ as *heir alioqui successurus*.” Therefore Lord Meadow-  
 bank himself shows that the Little Gilmour case is the  
 very first in which the point was ever decided in the  
 Scotch Court, for that the Scotstarvit case, which was  
 contrary to Riccart’s case, was improperly decided,  
 and consequently this is the only case against which I  
 have to contend.

What then is the ground Lord Meadowbank takes ?  
 Does he lay down any principle, except that of *portio legitima*, in which I say he is mistaken ? Does he bring forward any argument to support the proposition for which he contends ? I say, with all respect for the memory of that very learned and respectable judge, his reasoning is unsatisfactory. He talks of proceeding on “ popular principles ;” he talks of the estate being the natural estate of the heir, and in language to which no lawyer can affix any definite idea.

The other opinions were delivered very shortly. The Lord Justice Clerk, Hope, who had been counsel for Sir John Stewart, said, “ that though the claimant “ took the estate as heir of entail, still it was his own “ natural estate to which he succeeded.” Now, what is the meaning of this ? According to this, if the Liberton estate and Craigmillar estate had not been entailed by the immediate ancestor of the claimant, but



by some stranger, and there had been some natural estate which had been long in the family, it would seem, according to this learned judge, that though it had been entailed, yet, being the family estate, it was natural there should be collation as to that; but that with regard to lands taken by the bounty of a stranger, as those were not the estate of the claimant, there should be no collation whatsoever. It is impossible to say here that the Carmichael estate was the natural estate of the Carmichael family. It belonged to the earls of Hyndford; they are to be considered as strangers with regard to the Anstruther family; and if the rule applies to the family estate only, I say that here there ought to be no collation. His lordship then goes on to say: “ He was  
 “ also heir of line ab intestato to his father in the same  
 “ estate; and it was perfectly clear that the same  
 “ opinion had been entertained by the judges who  
 “ decided the case of Rae Crawford, for the inter-  
 “ locutor of the Lord Justice Clerk, M<sup>c</sup>Queen, to which  
 “ the Court adhered, would not have contained the  
 “ qualification which it does in any other view of the  
 “ case,— ‘ in respect that Mrs. Rae Crawford was not  
 “ ‘ heir of line, but only heir of provision;’ and that if  
 “ this had not been the meaning of the Court the first  
 “ member of that sentence would not have been in-  
 “ serted. But the meaning which I attach to those  
 “ words, ‘ in respect that Mrs. Rae Crawford was not  
 “ ‘ heir of line, but only heir of provision,’ is, that this  
 “ was not an estate she held as heir of line; that she  
 “ was only heir of tailzie; she held the entailed estate;  
 “ for that reason she was not bound to collate.

“ Lord Newton concurred both in the opinion of  
 “ Lord Meadowbank, and in the remark on the case of

ANSTRUTHER  
 v.  
 ANSTRUTHER.  
 15th Apr. 1835.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ Rae Crawford made by the Lord Justice Clerk, and  
 “ said that this proposition was most satisfactorily made  
 “ out, that the claimant as heir of line to his father  
 “ must either collate his portio legitima, or abandon his  
 “ claim to a share of the moveables, because, burdened  
 “ or not, he had gratuitously received that estate which  
 “ the law had declared to be the legal price of any such  
 “ share.” Now, where has the law declared that the  
 collation of an entailed estate is the legal price that  
 is paid for the privilege of claiming a part of the  
 personal estate? I can find such an expression no  
 where but in the mouth of Lord Meadowbank. Lord  
 Newton then proceeds:—“ That there would be no  
 “ difficulty in collating; that it was quite consistent with  
 “ the rules of the law to collate the value of a pro-  
 “ perty; that it could be easily ascertained; that heirs  
 “ of entail were in the practice of selling their life-  
 “ rents; that liferent rights might be adjudged; that  
 “ tacks secluding assignees were collated, and that  
 “ there was nothing in the nature of an entail to  
 “ prevent a similar collation, if the heir found it for his  
 “ interest to do so.” The rest of the Court coinciding  
 in opinion, this interlocutor was pronounced:—“ Find  
 “ that Walter James Little Gilmour, heir of entail and  
 “ provision to his father in the entailed estates of  
 “ Craigmiller and Libberton, being also heir of line to  
 “ his father, cannot claim a share of his moveable estate  
 “ along with his sister without collation.”

Now, with great respect for the opinions of those  
 three learned judges, I ask, are those reasons which they  
 give satisfactory? Is this case to be decided on popular  
 principles, or on the ground that this is the natural  
 estate of the claimant, and that the entailed estate is the

portio legitima of the heir? Those are the only reasons given, and there is no authority from any text writer, or any decision, and no principle laid down upon which that decision can be rested.

ANSTRUTHER  
v.

ANSTRUTHER.

15th Apr. 1835

The respondents, being, I suppose, very confident in the reasoning of the judges in the Court below, have given to your lordships, in the appendix to their case, the opinions pronounced after the present case had been argued; and one would suppose from what Lord Cringletie says, that the judges had taken infinite pains,—that they had consulted all the other members of the bench,—that they had done what Lord Meadowbank said he would not do,—had studied the law of collation, and the law as it is to be found in the civil law of other countries in Europe, and that this was a very profound judgment. Now, I will read all that passed upon that occasion. “ The Lord Justice Clerk.—I have perused  
“ the papers with all due attention, which argue the  
“ case on both sides remarkably well. I highly  
“ approve of the manner in which the case is argued  
“ on the part of Mrs. Anstruther. In the paper  
“ drawn for Mrs. Anstruther and her husband all the  
“ points of the case are ably and clearly discussed,  
“ and, considering it altogether, I am decidedly of  
“ opinion that Sir Windham Carmichael Anstruther  
“ is not entitled to share in the executry without  
“ collating his interest under the entails under which  
“ he now possesses the estates. Looking to the case of  
“ Gilmour, which in my opinion involves every point  
“ of importance to the decision in this case, I must say,  
“ that, from the manner in which it was decided,—from  
“ the satisfactory opinion delivered by the late Lord  
“ Meadowbank, and assented to by the whole Court,

ANSTRUTHER v. ANSTRUTHER  
 15th Apr. 1835.

“ I cannot think of interfering with that solemn and  
 “ deliberate judgment. Considering the whole autho-  
 “ rities, and the whole stream of the decisions quoted to  
 “ your lordships by the other side, I have not the  
 “ slightest doubt of the correctness of the judgment  
 “ then pronounced in the case of Gilmour; and the  
 “ more deliberately the case is considered, the more con-  
 “ clusive must be the opinion which your lordships must  
 “ entertain upon that judgment. I shall say no more  
 “ in regard to the claim of Sir Windham Carmichael  
 “ Anstruther, than that he is bound to collate before he  
 “ can claim one sixpence of this executry; and here  
 “ there would be no difficulty whatever as adopted in  
 “ the case of Gilmour,—no difficulty in Sir Windham  
 “ contributing the rents of the estates, making them a  
 “ common fund, and then claiming as next of kin; being  
 “ heir of line and heir of entail he is bound to collate  
 “ before he can claim in the executry.”

Now, that is the whole of the judgment of the Lord Justice Clerk, and I must say, with great deference to that very distinguished judge, that it is not one of the most favourable specimens of judicial reasoning.

“ Lord Glenlee.—I am of the same opinion as your  
 “ lordship. The case is the same as that of Gilmour.  
 “ Sir Windham Carmichael Anstruther must collate  
 “ his life interest in the heritable estates before he can  
 “ claim in the executry fund.”

“ Lord Cringletie.—It appears to me to be quite  
 “ unnecessary to add any thing to what has already  
 “ been so well said. I entirely concur in the opinion  
 “ expressed, that Sir Windham cannot share in the  
 “ executry till he collates.”

“ Lord Meadowbank.—If there is any point solemnly

“ and deliberately laid down in the law of Scotland, I  
 “ am of opinion that this is; and it would be paying no  
 “ compliment to the decision given in the case alluded  
 “ to, to attempt to shake the principle established by  
 “ saying one word more on the subject.”

ANSTRUTHER  
 v.

ANSTRUTHER.

15th Apr. 1835.

“ The Dean of Faculty trusted that their lordships  
 “ would find his client entitled to expenses.”

“ The Lord Justice Clerk said, in his opinion  
 “ there could be no doubt whatever. He would remit  
 “ to the Lord Ordinary to proceed accordingly, and  
 “ find the claimant Sir Windham Anstruther liable in  
 “ expenses.”

That is the whole which passed.

Now, I venture to say, that neither in giving judgment in the Little Gilmour case, nor in giving judgment in this case, do the learned judges grapple with the difficulties of the case. They give no reason whatever why the heir of entail, being likewise heir of line, should be compelled to collate the entailed estates, which he would not be compelled to collate if he were only heir of entail. I find no dicta nor decisions to fortify that which is the foundation of the judgment, that the entailed estate is the portio legitima of the heir of entail; and if that were, let my learned friend answer this question. Lord Meadowbank says, that the entailed estate is the portio legitima of the heir of entail. If it were so, why should he, having his portio legitima in the entailed estate, encroach on the portio legitima of the children—the personal estate, even under the condition of collating it? That shows that the entailed estate is not the portio legitima; I contend that a judgment which rests upon such a foundation cannot stand.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

*Mr. Murray* followed on the same side, arguing the general principles and commenting on the cases. On coming to that of *Rae Crawford*, he proceeded thus:— Here I wish to call your lordships attention to the observations which were made when the case of *Rae Crawford* was decided. That case is of peculiar importance, because it was decided in December 1794, after the case of *Balfour v. Scott* had been reversed in this House. It was therefore determined after there had been considerable discussion, and came under the view of the Court only about a year after the judgment of this House had been pronounced. In that case *Mrs. Rae Crawford* succeeded to an estate of a considerable value under a strict entail which had belonged to her elder brother. There was another brother who was heir of line, and collated, and also another sister who claimed *Mrs. Rae Crawford's* share, and wished to exclude her unless she collated the entailed estate. The Court held that under these circumstances she was not bound to collate the entailed estate. Why? Because she was not heir of line. We say, as it is thus clear that if another person had been heir of line he would not have been compelled to collate, so we cannot be in a worse position, because we stand in the character of heir of line. The observations of the judges on the bench are important to this point. They say *Mrs. Rae Crawford* is a stranger to her brother's heritable succession, being neither his heir at law, nor taking any thing under any deed of his, and therefore the law of collation cannot in any shape apply to her. She succeeds to the estate of *Milton* under a strict entail executed by their common ancestor, and not as representing her deceased brother who himself was only an heir of entail, and

it is no reason for excluding her from a share of his moveables that she takes an estate to which, in consequence of the destination of the tailzie, he was a prior substitute to her.

ANSTRUTHER  
v.  
ANSTRUTHER.  
15th Apr. 1835.

*Lord Brougham.*—How would it be, supposing instead of being heir of entail, she was heir under a devise, as heir provisional by force of the settlement?

*Mr. Murray.*—I apprehend that we must separate the two characters, and if I give up every thing I succeeded to as heir of line, I am entitled to take in the stranger character of heir male. [He then commented on the case of Gilmour, and particularly on a statement by the respondents, that one of the estates did not flow from a direct ancestor, and referring to the printed pleadings, he proceeded.] Now so far as that might be supposed to make any difference in the case, or to have led to a more enlarged view of the legal question, it was not under the consideration of the Court; for though the case is reported at very great length in the Faculty Decisions, and is fully argued in the Informations, there is no allusion in either of them to any such distinction in respect of the estates, which was absolutely necessary to bring out the full extent of the legal question.

*Lord Brougham.*—I have read with great care the judgment of Lord Meadowbank. It is a very able judgment; but what I do not understand is, that he decides on popular principles. Instead of a popular view, it is a highly learned and technical view he takes of the subject. I apprehend he means to refer to the portion taken by the heir instead of confining himself to what is his natural right,—natural or feudal principles; he does not use the word natural in its popular sense, but his natural right, assuming the feudal views to

ANSTRUTHER  
v.  
ANSTRUTHER.

15th Apr. 1835.

be the law of Scotland (which is the most unnatural law that ever existed). But he says such is the right according to such principles; that is what he means by popular principles, that there is a sort of crude equity governing the case; and by legitima portio he means to say in popular language, that the real estate is the legal estate of the heir, while the moveable estate is the legal estate or legitima portio of the younger children.

*Mr. Murray.*—I apprehend that what his lordship referred to as popular and natural principles were, that the estate had descended from father to son, as it would have done according to the common and popular rules.<sup>1</sup>

*Dr. Lushington for the respondents.*—The question which is now mooted at your lordships bar is one that is admitted to have been decided in the year 1809 by the Court of Session in Scotland, a decision from which there was no appeal, notwithstanding it involved a very considerable property; but after the expiration of twenty-six years the appellant seeks to impeach the validity of that decision, and to show that the principles on which it was founded are not tenable according to

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<sup>1</sup> In the course of Mr. Murray's speech the following observations were made as to referring to living authors on law. Mr. Murray said: there has been reference made in the respondent's case to the authority of living writers, but I apprehend that the work of a living author ought not to be quoted.

*Lord Brougham.*—There cannot be a stronger expression of that than that your illustrious kinsman, Lord Mansfield, would not allow Mr. Justice Blackstone's Commentaries to be quoted. He said, "I hope the day is far distant when it will be regular in any way to quote Mr. Blackstone's Commentaries," meaning after his death. They used to quote, and I have done it myself, "a certain book" upon shipping, before the learned author, who at that time became a learned judge, but we never called it "Abbot on Shipping," and he always said there were two good arguments against quoting it, one, that it was good for nothing, and another, that the author, whoever he was, was still alive.



the law of Scotland. I think that the very first observation which must occur to your lordships is, that those who in a question of this particular kind bring forward this appeal after such a lapse of time, and after a decision of so much consideration had remained undisturbed, have a very heavy onus cast upon them; because, unless your lordships be perfectly satisfied that that decision was erroneous, nothing could be more dangerous than to disturb the course in which property to so large an amount has hitherto flowed; for I need not tell your lordships, that if there be any principle more established than another, it is that with relation to the succession of property; for when once you find that a course has been established, it is not competent to dip into antiquity for the purpose of giving reasons why a contrary course ought to have taken place, or by ingenious reasoning to endeavour to show that any other form of succession would have been more advantageous to people at large.

ANSTRUTHER  
v.  
ANSTRUTHER.  
—  
15th Apr. 1835.

*Lord Brougham.*—I observe that the judges in deciding this case merely express their concurrence in the somewhat more expanded statement of the Lord Justice Clerk, but they rest their judgment almost entirely upon the authority of the Little Gilmour case. Are we not then to suppose the Little Gilmour case to be as much under appeal, though not as regards the effect of it, but as regards the ratio decidendi, as if that case were now before us?

*Dr. Lushington.*—I conceive that the judges thought the case exhausted by the Little Gilmour case, and that the judges in that case had said all they would have wished to have said; and that not only all the arguments

**ANSTRUTHER** at the bar were exhausted, but that every thing which  
**ANSTRUTHER** could be said was to be found embodied in the opinion  
15th Apr. 1835. of Lord Meadowbank.

In regard to the case of Scotstarvit, I hold it a most important one, and an authority for the decision of the Little Gilmour case, and also of the present case; and as to the reversal by your lordships, that depended on totally different principles, and does not in the slightest degree destroy the application of the case of Scotstarvit to the present; for the result of that judgment was, that entailed property ought to be brought into collation, and the reversal in no way affected that decision. The appellant has contended that there is no authority in the law of Scotland supporting the decision in the case of Little Gilmour, and he appears rather to attribute that decision to Lord Meadowbank's indulgence in his own invention, and to his having taken up a system of law not known in the law of Scotland. But we maintain that all the authorities which have been cited support the principle so laid down. It is true that no case is to be found in which it was specifically decided that an heir of entail, being at the same time heir of line alioqui successurus, was bound to collate his entailed property. On the other hand there is not any case, or the dictum of any text writer, impugning the doctrine adopted by the Court in the case of Little Gilmour; and unless that doctrine is palpably erroneous, I submit that, in the absence of all authority, the doctrine laid down by that case is not to be shaken on very slight grounds. [Dr. Lushington then stated the facts of this case generally; and afterwards proceeded thus.] A good deal of argument on the

other side has depended on using expressions not applicable to the existing state of facts; what we contend is this, that the heir of line being also heir of entail of property of which the intestate was possessed, and next of kin also, cannot claim a share of the personalty without collating not merely the estate he received ab intestato, but also the entailed estate.

ANSTRUTHER  
v.  
ANSTRUTHER.  
15th Apr. 1835.

*Lord Brougham.*—A man takes an estate by devise or disposition as absolute fiar to which he was alioqui successurus. Now supposing no disposition had been made in his favour, I apprehend in Scotland, at least in England, he would take an estate by descent and not by purchase. In that case I can perfectly understand how, in order to have the benefit of the executry, he must collate the corpus of that estate; but if instead of taking a fee-simple by disposition or devise, he takes a fee-tail, or rather an estate for life, (for, although you call it a fee in Scotland, he takes a life estate, or, as you call it, a succession of fees, but which are limited as to enjoyment, and bound as to descent, and which he cannot part with or burthen,—so that he truly takes a life estate, to which you still call upon him, on the same principle, to collate;) what is he to collate? Not the corpus, for he has not that to collate; but you call upon him, by analogy to the corpus, to collate so much as he takes,—so much of the corpus as is common to both situations, both to his tailzied title, and to that he takes alioqui successurus; and you say that he must collate that life interest. That is what I understand to be your argument. The question is, can that argument be supported upon principle, he not having succeeded properly? This is the argument which presses upon my mind against

ANSTRUTHER v. ANSTRUTHER. the Little Gilmour case, and which I wish you to deal with.

15th Apr. 1835. *Dr. Lushington.*—That is the view of the case which presents the greatest difficulty, but I hope to satisfy your lordships that, according to the principles of entail law, where the heir is also heir of line, he is just as much heir of line as if the estate was not entailed. It may be true that according to the substance the heir of entail may simply take a life interest, but your lordships must look to what was the view taken by the law of Scotland as to succeeding to an entailed estate in ancient times; and it will be found, according to the view of that law, that he was considered absolute fiar, except to the extent of the restrictions imposed upon him. I can show your lordships, by authority, that an entailed estate is not to be considered as a succession of liferents, but a succession of absolute fees, except so far as there are particular burthens imposed by the effect of the entail; and if that be the real case, it will never do to resort to any rules of equity as to what ought to be the way in which matters of this kind were arranged. It must be considered with reference to legal principles existing at the time the rule was introduced; and I think I shall be able to show that the very rules which apply to an estate received ab intestato apply to an estate taken by entail. I apprehend it cannot be denied that where the same person happens to be heir of line to an entailed estate, as well as heir of tailzie, it is not correct to say that his character of heir of line is excluded by his character of heir of entail, and that the character of heir of line, to some purposes at least, remains unaffected, and not destroyed in consequence of his

character of heir of entail. I do not accede to the argument, that it is not a matter of importance to consider what was the nature of the tenure of real property at the periods those authors which have been referred to wrote, and when the law of collation was introduced into Scotland. At what particular period the law of collation was introduced into Scotland, perhaps, it is impossible now to ascertain; but this is a proposition incapable of being denied, that from the very earliest times the law of collation has prevailed in Scotland. Lord Bankton lays down the proposition, that collation was permitted to the heir of line, that he might never be worse off than the next of kin; that, in consideration of his taking the real estate, he was distinctly deprived and excluded (to use the words of Lord Stair) from any share of the executry, but, as a matter of favour, he was permitted, being heir, to have a share of the executry, provided he collated the whole of the heritage he received on the death of his ancestor.

Mr. Erskine, (Book 3. tit. 9. s. 3.) in speaking on the subject, says, “Where the estate of the deceased consists partly in heritage and partly in moveables, the proper heir in heritage has no share of the moveable estate if there be others as near in degree to the deceased as himself. Thus in the line of descendants the eldest son gets the whole heritage, and all the other children, whether sons or daughters, divide the moveable estate among them in capita. Thus also in the collateral line, that brother who as heir at law is entitled to the whole heritage is excluded by his other brothers and sisters from any share in the moveable succession.”

My friends have contended that in point of fact the

ANSTRUTHER  
v.

ANSTRUTHER.

15th Apr. 1835.

**ANSTRUTHER** heir at law, according to the law of Scotland, had an  
**ANSTRUTHER** original right precisely the same as the other next of  
 15th Apr. 1835. kin, but that that original right was taken from him by  
 reason of his being heir at law; and it then imposed on  
 him the necessity of collating his heritage to enable him  
 to come into succession. Our case is that the heir at  
 law, by reason of the feudal system, whereby the whole  
 of the heritage would descend to him on the death of  
 his ancestor, never had any right, though next of kin,  
 to the personal estate; but when the system of collation  
 was introduced, it was done for the express purpose of  
 conferring on the heir at law a benefit, viz., a title to  
 share in the executry on condition of collation, he  
 having ab origine no right whatever to share in the  
 executry.

Mr. Erskine proceeds: “ But where the heritable  
 “ estate of the deceased is so inconsiderable, in pro-  
 “ portion to the moveable, that the heir finds it his  
 “ interest to renounce his exclusive claim to the  
 “ heritage, and betake himself to his right as one of the  
 “ next of kin, the law allows him to collate or com-  
 “ municate the heritage with the other next of kin, who  
 “ in their turn must collate the executry with him, so  
 “ that the whole estate belonging to the deceased is  
 “ thrown into one mass, and distributed by equal parts  
 “ among all of them; and even though the heir be not  
 “ one of the next of kin, if he be a grandson by the  
 “ eldest son of the deceased, he seems entitled to the  
 “ privilege of collating with the deceased’s immediate  
 “ children, for since he succeeds to the heritage as  
 “ representing his father, who was one of the next of  
 “ kin to the deceased, he ought to enjoy all the  
 “ privileges which would have been competent to his

“ father as heir, had he survived the grandfather. **ANSTRUTHER**  
 “ Where the deceased leaves only one child, he is both **v.**  
 “ heir and executor without collation; for where the **ANSTRUTHER.**  
 “ right of the whole estate, heritable and moveable, **15th Apr. 1835.**  
 “ descends to the same person, there is no room for  
 “ collating the one with the other. This kind of col-  
 “ lation is admitted, not only in the succession of  
 “ descendants, but of collaterals; so that a brother who  
 “ succeeds as heir to the deceased, if he judges the  
 “ moveable succession to be the most profitable of the  
 “ two, may collate with his younger brothers and  
 “ sisters, and so come in as equal sharer with them in  
 “ the whole succession.” It is remarkable that to such  
 an extent has the doctrine been carried to compel the  
 heir at law to collate the whole estate, that it is applied  
 to cases of foreign heritage; and in the year 1825, after  
 argument, it was decided in the Court of Session, where  
 an heir at law had an estate in the island of Jamaica,  
 before he could be permitted to share in the executry,  
 he must collate that foreign heritage. Mr. Erskine  
 states finally as a reason:—“ For as collation was  
 “ admitted into our law that the heir might in no event  
 “ be in a worse condition than the other next of kin, that  
 “ reason has equal force in the succession of collaterals,  
 “ and of descendants. It is only the legal heir, or the  
 “ heir ab intestato, who is thus obliged to collate the  
 “ heritage with the other next of kin, in order to have  
 “ the benefit of the moveable succession.”

Now, if collation took place according to the law of  
 Scotland at a very early period of the Scottish history,  
 I apprehend that at that time nearly the whole of the  
 real estates must have been held by titles very different  
 from those titles which exist at present. When collation

**ANSTRUTHER** first took place, the whole of the real estate to which  
**ANSTRUTHER** the heir of line succeeded on the death of his prede-  
 15th Apr. 1835. cessor descended to him in the nature of a strict entail;  
 because, for a very long period of time antecedent to  
 the passing of certain statutes, it was clear that upon  
 the death of the predecessor the heir at law took nothing  
 but a life estate property,—I mean in point of extent of  
 power over the whole estate. He had no power of  
 gratuitous alienation, and was incapable of exercising  
 that power which statutes from time to time have con-  
 ferred upon the vassals and owners of land in Scotland.  
 Mr. Erskine says (Book 2, title 7, s. 5.), “ By the  
 “ genuine principles of the feudal system no vassal had  
 “ a power to transfer the right of his feu to another  
 “ without the superior’s consent; for, in rights merely  
 “ gratuitous, the grant, together with all its conditions  
 “ and limitations, must depend entirely on the grantor’s  
 “ pleasure, and agreeably to those rules the superior  
 “ was not bound to receive any person in the lands  
 “ other than the heirs to whom he himself had limited  
 “ the descent by the investiture, though the greatest  
 “ sum should have been offered him in the name of  
 “ entry. Hence Craig with reason affirms that no  
 “ entail is effectual without the superior’s consent,  
 “ because the fee is thereby made to devolve on a  
 “ different order of heirs from that which was contained  
 “ in the original grant; and where the lands are made  
 “ over in the superior’s grant to the vassal and his  
 “ assignees, the superior is obliged to receive the  
 “ assignee only while the right continues personal,  
 “ namely, before sasine be taken upon it, but not after  
 “ perfecting it by infestment; for the word assignee in  
 “ a feudal grant ought to be applied only to personal



“rights.” Now, supposing at that period a man had died, leaving four children, his heir at law would have taken the real estate, and that estate he must have brought into collation. But what would have been brought into collation? Nothing but a life estate merely. He had no power of disposing of that heritable property, and no power of bringing the whole fee as it were into collation; he could bring only that which he was entitled to, and that was a life interest (though it might be called a fee), as it is in the case of an entailed estate.

ANSTRUTHER  
v.

ANSTRUTHER.

15th Apr. 1835.

*Lord Brougham.*—How would a person be who took an estate from another without the resolute clauses: would it operate merely as a simple destination? Notwithstanding the prohibition he could alienate the estate. Now, in that case would he have been obliged to collate his life estate or the corpus?

*Dr. Lushington.*—Mr. Clerk, who argued the case of Little Gilmour, and against the decision, puts that case and says, that perhaps in that case he might be called upon to collate. He seems to be pressed by that argument, and adverts to it; and your lordships presently will see, when I come to comment on what occurred in that case, the argument used by Mr. Clerk on that occasion.

Your lordships are aware that it is by a series of statutes the landed property of Scotland has become capable of alienation, first by a statute in favour of creditors, and next by other statutes which entirely set free (except in cases of entail) real property held by individuals in Scotland. This view is exceedingly important, because the law must be founded not on the state of things as they exist at this present moment, but

**ANSTRUTHER** as the law itself with respect to collation has subsisted  
<sup>v.</sup>  
**ANSTRUTHER.** for an extensive period, and long anterior to the passing  
 15th Apr. 1835. of these statutes. We must consider that the law of  
 collation prevailed at that period when the whole property in Scotland was held as of the nature of entailed estates, and it was considered as no possible impediment to the heir at law's collating, though he had neither more ample nor more extensive rights than those which an heir of entail has at the present period. [He then proceeded to comment and argue on the authorities referred to by Sir John Campbell, contending that they all demonstrated that the heir of line, where he succeeds to an entailed estate, does not lose his character of heir of line even with respect to that estate itself.] He then went on thus: Balfour says, "No person, succeeding  
 " heir to his father's or predecessor's lands and heirship  
 " goods, ought and should have any part of any  
 " remaining moveable goods or gear which pertained  
 " to his father or predecessor at the time of his de-  
 " cease, except he would cast in and confer his whole  
 " heirship goods with the rest of the said whole move-  
 " able goods and gear altogether, that equal partage  
 " might be made thereof betwixt heirs and the rest of  
 " the bairns."

Mackenzie uses these terms:—"The heir has no  
 " share in the moveables except he collate, and be  
 " content that the rest of the children shall share  
 " equally with him in all that he can succeed to as heir,  
 " or in case there be but one child, for then that child  
 " is both heir and executor without collation." Now I grant that these are ambiguous terms, and it is said that this must mean heir at law, and nothing else. But if it had been the intention of Sir George Mackenzie to

have expressed any exception to the general rule, the great probability is that he with his accuracy would have stated in more explicit terms that it was only that to which he succeeded as heir at law, and that it did not include what he might also take in the character of heir of entail. But your lordships will not find in any one of those authorities the slightest intimation whatever that it was the intention of any of those writers to make any difference whatever with respect to the heir of entail; on the contrary, the whole of them used the most comprehensive terms, which would include the heir of entail. Thus Lord Stair says, “Heirs are excluded from the bairn’s part, though in the family, because of their provision by the heritage.” “Exclude” is the word used by Lord Stair, except in two cases; first, “If the heir renounce the heritage in favour of the remanent bairns, for then the heir is not to be in a worse case than they, but they come in *pari passu* both in heritable and moveable rights, which is a kind of *collatio bonorum*.” Secondly, “It was found, if there be but one child in familiâ, and so both heir and executor, that child hath not only the heritage, but the whole bairn’s parts, and abates the relict’s parts and dead’s part, without collation of the heritage.” Now my learned friend commented on the term “heritage” as if it necessarily meant every thing which was directly inherited from the ancestor *ab intestato*, and did not include all the property which, in consequence of the death of an immediate predecessor, had been acquired of an heritable nature. But the case of which Lord Stair is speaking must be a case in which the immediate ancestor (respecting whose succession we

ANSTRUTHER  
v.  
ANSTRUTHER.  
15th Apr. 1835.

**ANSTRUTHER** are inquiring) was a person possessed of that kind of  
**v.**  
**ANSTRUTHER.** property which we are now contending the heir is  
 15th Apr. 1835. bound to collate ; and I submit the true meaning of the  
 passage is, that every benefit derived in consequence of  
 the death of that ancestor by a person being heir at law  
 to him is intended to be collated, being of an heritable  
 nature, to entitle the heir of line to that benefit which  
 he had no right to at common law, and which he was  
 only entitled to take on condition of performing the  
 obligation imposed upon him.

Lord Bankton writes at very considerable length  
 upon the subject, and he says, “ Where the eldest  
 “ son succeeds as heir he cannot claim any interest in  
 “ the executry, either as a share of dead’s part or  
 “ legitim, because in such case the succession divides.”  
 How? One part of our inquiry throughout the whole  
 of this case must be whether my Lord Meadowbank is  
 justified in the use of the terms in which he expressed  
 himself. Bankton says, “ The succession divides,”  
 (that is in substance what Lord Meadowbank had said  
 before,) “ and the heritage goes to the eldest son with  
 “ the burthen of the heritable debts, and the executry  
 “ to the younger children with the burden of the move-  
 “ able. But as the eldest son is still one of the nearest  
 “ in kin with his brothers and sisters, he may still claim  
 “ in that character a share of the whole executry with  
 “ them upon collation or contribution of the heritage,  
 “ both what he succeeds to after his father’s death, and  
 “ what he got disposed to him before, perceptione hære-  
 “ ditatis.” It is not unimportant, in tracing the law, to  
 show that collation does not depend on succession ab  
 intestato. On the contrary, the law contemplates that

the whole of the property which was at any time held by the intestate should be collated, even that acquired during the life of his predecessor by disposition, marriage contract, or otherwise, thus showing that the obligation to collate was intended to extend as far and as comprehensively as possible.

ANSTRUTHER  
v.  
ANSTRUTHER.  
15th Apr. 1835.

Many of the cases which have been referred to appear to be entirely foreign to the present one. All the cases prove that the heir of line must collate, and your lordships will also find that there is not the slightest intimation of a contrary notion in any one of them.

*Lord Brougham.*—Is the heir of line bound to collate, though he pays 10,000*l.* for the estate?

*Dr. Lushington.*—No, my lord; there he does not take in the same mode.

*Lord Brougham.*—But there are many cases in which he may take as an heir tailzie with a consideration in money, or he may take in the form of a gift, or by a settlement, or under a marriage contract—the highest consideration known in the law. How are those two positions different? That is my difficulty. How would it be if he takes by purchase; if he pay 5,000*l.* to be made heir entail?

*Dr. Lushington.*—To the extent perhaps he might be liable.

*Lord Brougham.*—That is, I suppose, you mean beyond the 5,000*l.* But it is not enough to grind a little law as you go on; show me that it is so?

*Dr. Lushington.*—Your lordship is aware that this is a branch of the law that is very much in difficulty, even with the most learned persons.

*Lord Brougham.*—I feel that as much as you do.

ANSTRUTHER *Dr. Lushington* then commented on the case of  
 v.  
 ANSTRUTHER. Jack in 1763, contending that it established the distinc-  
 15th Apr. 1835. tion between the case of an heir alioqui successurus and  
 heir portioner; that it was quite clear that if it had been  
 the case of a son and two daughters it could not have  
 been disputed that the son must have collated the estate.  
 He then adverted to the cases of the Duke and Duchess  
 of Buccleuch against the Earl of Tweeddale, and Mur-  
 ray against Murray, after which he proceeded thus:—

Then there is the case of Riccart against Riccart,  
 from which very important information is to be col-  
 lected. Indeed, as we descend downwards, all the  
 cases become more important; they are reported at  
 greater length, and we have a better insight to what was  
 the intention at the time.

*Lord Brougham.*—I do not think so; not for a hun-  
 dred years; I think for a century there are no useful  
 reports at all; they give the decision of the judges, but  
 they give only the arguments of counsel. I defy any  
 human being, in a case of difficulty where you want to  
 apply it, to know on what reason the judgment was  
 given. You have an argument that might have been  
 made by a steam engine, abridged perhaps from the  
 pleading, and then that the lords found so and so.

*Dr. Lushington* proceeded to state the case of Ric-  
 carts, after which, and on alluding to the Little  
 Gilmour case,—

*Lord Brougham* said,—One thing has pressed on my  
 mind through the whole of the argument, and in such a  
 case I should like to have had the benefit of consulting  
 the judges. But was not Little Gilmour a case of first  
 impression, so to speak, for it is only the judgment of  
 the Second Division? and just see what a disadvantage

one is under when you consider that at that time the President of the First Division was so very eminent an individual in all branches of the law, but in none more than in real property—I mean the Lord President Blair. It would have been highly expedient to have had the whole matter laid before all the judges. My great difficulty very likely arises from my English law habits, and from not having looked into the Scotch law cases. You may remove them, but if they are not removed I shall not call on Sir John Campbell or Mr. Murray to reply. Not that I have made up my mind one way or the other; quite the contrary; but I should send the case back to their lordships. I do not mean to say any thing which in the slightest degree may be considered as drawing an invidious comparison between the two great branches of the Court, consisting of that which lies within the wall and that which lies without the wall; they are both eminent and learned branches; but it is impossible for me to shut my eyes to one consideration, that in the outer branch of that Court I find such men (and there are no such men, except in the Inner House, to be found anywhere in Scotland,) as Lord Mackenzie, Lord Corehouse, Lord Moncrieff, Lord Jeffrey, and Lord Fullerton. That is a prodigious temptation to my mind in settling so important a branch (and this will settle for ever this branch of the law) to take the highest and the best means to remove any doubts upon so venerable authority as that of Lord Meadowbank and his coadjutors, Lord President Hope and others, who decided that case.

*Dr. Lushington.*—My lords, I have the advantage of having near me a gentleman who is principally in-

ANSTRUTHER  
v.  
ANSTRUTHER.  
15th Apr. 1835.

ANSTRUTHER <sup>v.</sup> ANSTRUTHER. interested, and he authorizes me to say that to that course I should offer no objection.

15th Apr. 1835.

*Lord Brougham.*—This appears, my lords, to be a case of very grave importance, and I think it will be expedient, that before remitting, which seems to be the most satisfactory course for all parties—before remitting the case to the consideration of the Court below, it appears highly expedient that, in order that the remit should be accompanied with all the good effects that can naturally be expected to grow therefrom, I take leave humbly and shortly to state to your lordships my view of the whole of this case. It will be more convenient that I should state that view at present, when we are at the close of the argument which we have in part fully heard for the appellants, and which is partially begun on the part of the respondent. But it will be more satisfactory to my mind, perhaps, if I do not give these learned persons the trouble to come again; but if the parties will come back at four o'clock I shall then be prepared to give my view of the case, and I will reduce into writing such view as presses on my mind, and which I think should be pressed on the Court below, valeat quantum.

*Dr. Lushington.*—I was going to draw your lordship's attention very particularly to the case of Balfour and Scott, in order to show that the character of heir at law is not entirely sunk in that of heir in tail, to Lockart and Dunmore, Dictionary, 15,047; Mackenzie against Mackenzie, Dict. 15,053; the case of the Duke of Argyle and the Earl of Dunmore, Dict. 15,068; and the case of Stewart and M'Norton, on the 2d December 1824, in the second volume of Shaw and Dunlop.



LORD BROUGHAM.—My lords, the present question, confessedly one of great importance, and of which I regard the difficulty as not inconsiderable, arises out of that provision of the Scotch law which enables the heir, who, but for his inheriting the real estate of his ancestor, would have taken a share in the personal property as next of kin, to take that share as one of the children or other heirs in mobilibus at his election, but only upon paying the price by bringing in his inheritance as part of the whole fund or succession, and letting it be divided with the heirs in mobilibus. The law regards the succession in all cases as twofold — heritable, which goes to the heir, excluding the other next of kin — and moveable, which goes to the other next of kin, excluding the heir. But, as the heir is the person peculiarly favoured by the law, and as this preference might operate to his detriment rather than his advantage, were he confined in all cases to the real estate, an option or election is given him, by which he may be no worse off than the other next of kin, though he shall not be better off than they, if he elects to interfere with their fund, and so must let them share his land if he is to share their gear. Nothing can, therefore, be more just or fair than this fundamental principle upon which the doctrine of collation rests, always assuming that the heir is to have the preference as regards real estate, which excludes the other next of kin from any election as against him, while it gives him his option as against them. The equitable view of the subject, which gave rise to this doctrine, has been carried so far as to require an heir claiming his share of personalty to collate even real estate to which he succeeds in another country. This point was first considered in 1817, in the case of *Robertson v. Mac-*

ANSTRUTHER  
v.

ANSTRUTHER.

15th Apr. 1835.

**ANSTRUTHER** <sup>v.</sup> **ANSTRUTHER.** **reen \***, where the Court, after two opposite judgments by two Lords Ordinary (Balgray and Alloway), held it clear that a party claiming legitim in Scotland must collate the Jamaica estate to which he had succeeded from the same intestate that left the moveables. This seems to be a considerable stretch of the principle, and it was admitted to be then first decided. Would it not follow from the rule thus recognized, that if a youngest child in Scotland succeeded to lands of the tenure of borough English in Middlesex, he must bring those lands into the common fund before he could take his legitim or legal provision; for though quoad personalty he is a younger child, yet in England, where the land lies, he is quasi eldest — he is heir — for heir is nomen juris, and does not designate one child more than another. Does not this show the difficulty of holding that land situated in a foreign country, and dealt with and descending according to a foreign law, is to be regarded as if it were under the control of the Scotch law? Notwithstanding this rigour, however, in applying the principle, and making the heir pay the price, it never was contended that equality is to be worked out between him and the next of kin at all hazards, and that whatever the heir has, and however it may have come to him, he must bring it into the common stock. The real estate coming to him from the father or other ancestor, whose personal property is in question, is all that he can be required to collate; and I presume, upon a principle of presumed intention, that the father, who might have otherwise disposed of his personal estate, died intestate, and left the law to dispose of his sub-

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\* 18th Feb. 1817. F. C.

stance, believing the heir would take the land and the rest the gear ; but that, had he supposed the heir would claim upon the gear, he would have made another arrangement of his property. This, too, accounts for the collation being confined to intestate succession, and for the rule admitted to be settled, that if the heir takes nothing by inheritance, he needs not collate what comes to him from a remoter ancestor, even, it is said, where the immediate ancestor who left the personalty behind him was life-renter of the land, so that his death opened the succession to the heir. This principle it is that raises my first difficulty as to the provision, supposed by the judgment to exist in the law, as regulating the present question ; for if the heir, taking nothing in land from the last ancestor, owner of the personalty, needs not collate, merely because he takes nothing in land from that ancestor, why should he collate in a case where confessedly he takes just as little, namely, where he succeeds, but succeeds, not as heir of line, but as heir of tailzie, has no privity with the last heir of tailzie, could in no way be either helped or hurt by any thing that his predecessor could do, and takes, as regards him, by a title altogether as singular as if he had received the estate from a stranger ; in which case, it must be admitted, no question at all could have arisen upon collation whether the estate was entailed or not. It may indeed be said that the ancestor's presumed will as to the personalty is here the ground of requiring collation to be made by the heir of tailzie. But why is there more presumed intention in this case than in the last one put, namely, that of a tailzied estate coming to the heir through the last ancestor, owner of the personalty, and coming by the fact of his decease ? Surely he may

ANSTRUTHER.  
v.  
ANSTRUTHER.  
15th Apr. 1835.

**ANSTRUTHER** be supposed to have had this advancement in fortune  
<sup>v.</sup>  
**ANSTRUTHER.** also in his eye, and it may be said, that had he thought  
15th Apr. 1835. the heir would claim on the gear, he would have willed  
it away to the younger branches, because he knew full  
well that the same event which left the goods and chat-  
tels to them left the land to the eldest branch; and  
indeed the same argument would apply to the case of  
real estate coming from a mere stranger, but which the  
immediate ancestor, owner of the gear, knew would so  
descend upon and provide for his heir. The next  
difficulty which I have felt pressed by is akin to the  
former. The law has undoubtedly laid down that  
estate coming to one, though by conveyance, must be  
collated, provided it be such as but for the conveyance  
would at all events have come to the heir,—estate to  
which he was alioquin successurus. Now, granting that  
this is settled in the case of one taking the fee by desti-  
nation to which he would have succeeded at any rate by  
descent, and granting even the more general proposi-  
tion, that whatever interest, whether fee-simple or fee-  
tail, or any other more restricted interest, a person takes  
by singular title, he must collate, provided he would  
have taken it by inheritance in the event of no such  
destination having ever been made in his favour; still I  
do not see that this proposition (and it is a pretty large  
one) can cover the case of a person taking under a  
tailzie, as heir of tailzie, the estate which, but for there  
having been a tailzie, he would have taken as heir of  
line. We seem here to be confounding two very different  
things. We suppose the capacity of the heir of tailzie  
to be lost and merged in that of heir of line, because  
the same individual is clothed with both characters;  
and we also suppose that, because the estate which

is tailzied is also the estate which, but for the entail, would have descended upon the heir of tailzie as heir of line, therefore the same tailzied estate is in the same person in both his different capacities; in other words, that he takes in one way only what he would have taken in another, had there been no entail to interfere with the succession. If, indeed, this were true, no doubt the principle of collation would apply, and all the grounds that can be assigned for it would exist here; but it is neither true nor any thing like the truth. The heir of tailzie as such may be the same person with the heir of line, but, as regards the estate tailzied, he stands in a perfectly different position, and the estate tailzied and which he enjoys under the entail is not at all that which he would have taken by succession. By succession he would have taken the fee-simple, with all its incidents of absolute liberty of enjoyment, of dealing with it during his life, and leaving it after his death. By the tailzie he only takes the estate tied up in every way both as to enjoyment and as to succession; he takes the fee from one who might have given it as he chose; he takes the entailed estate from one who was himself tied up, supposing him to be only heir of entail; he takes the fee from the immediate ancestor; he takes the tailzied estate from some one else. Admitting that he must collate whatever he takes, to which he was alioquin successurus—here he was not alioquin successurus to the same thing which he took under the entail, but to another and a very different thing; he takes a tailzied fee by the entail, and he would have taken a fee-simple by succession. Is he bound to collate exactly what he would have taken by descent?—then let him collate the fee which he would have taken had there been no en-

ANSTRUTHER  
v.  
ANSTRUTHER.  
15th Apr. 1835.

**ANSTRUTHER** tail; but the fee he cannot collate, for he has it not.  
**ANSTRUTHER** <sup>v.</sup> Does not this show the difficulty of applying the rule  
15th Apr. 1835. of *alioquin successurus* to this case? But a subtle kind of argument appears to be raised in order to meet this difficulty. It is said that the heir of tailzie takes a portion of the fee which he would at any rate have succeeded to, and that such portion being common to both his capacity of heir of tailzie and heir of line, he must collate to that extent as *alioquin successurus*. Thus it is considered that he was *alioquin successurus* to a thing composed of two parts, the life-rent and the fee; that by the tailzie he takes one of those two parts, the life-rent, and that therefore he must, as *alioquin successurus*, collate to this extent. Now, though I will not deny the force of this observation, I must observe its repugnancy to the doctrine of a Scotch entail, resembling, as the observation does, and very closely, our English doctrine of remainders and particular estates. For a Scotch entail is a succession of fees to be successively enjoyed; not a carving out of one estate or interest into a number of portions to be vested immediately, but to be successively enjoyed; and therefore, consistently with this Scotch law doctrine, you can hardly hold that the heir was *alioquin successurus*, unless the kind of fee which he took under the tailzie was exactly the same with that which he would have taken by inheritance. Perhaps, indeed, the best support of the present decision, and of the case of *Little Gilmour*, is to be found in the principle of the heir of tailzie taking a fee only restricted in so far as he is tied up. But again he takes not a fee-simple to which he is *alioquin successurus*, but a fee-tail to which he never could have succeeded by inheritance. Let us now consider strictly the case of an

heir of tailzie under a simple destination — one holding by a tailzie without the fencing clauses. He takes no fee, that is, no fee-simple, nor any thing like it, but a feodum talliatum,—as both the old law of England and of Scotland term it,—a fee-tail. He is not validly prohibited, it is true, from converting it into a fee-simple : as in England he may do so by fine and recovery, and the conveyances substituted of late for that proceeding, so in Scotland by conveyance he may convert his right into a fee, or in Scotland he may, without any such process, validly deal with it as a fee in most particulars ; but until he does so, until he suffers a recovery here, or otherwise affects it in Scotland,—that is so long as he does nothing but enjoy it,—he has only a fee-tail. Now shall he be called upon to collate the whole corpus of this estate, or only the portion which he takes by force of the entail, that is, the fee-tail ? So, were collation the English law, would the tenant in tail with us be obliged to suffer a recovery for the purpose of vesting the fee in the common fund, and dividing it with the personalty ? This is one difficulty ; but another is akin to it. Suppose him to have done something to affect the remainder over in England, or in Scotland to burden the estate, and evict or otherwise injure the succeeding heirs of tailzie, I ask what is he to collate—the estate tail as he has made it, or the estate tail as he received it from his ancestor, or through his ancestor, owner of the fund ? This is a question of some nicety, and I do not see how it is to be dealt with upon the principles which have governed this decision ; for surely it would be going a great way to hold that he must collate, not only what he got under the entail, but what he made of that since he came to it, and which no

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

**ANSTRUTHER** power on earth could have compelled him to make of it,  
**v.**  
**ANSTRUTHER.** namely, a fee-simple. Again, what shall be said of one  
 15th Apr. 1835. who takes an estate by purchase for a valuable consideration? Suppose the heir buys the estate to which he was alioquin successurus, it is agreed on all hands that he is not to collate that; and yet how can an heir of tailzie, in contemplation of law, be said to be other than a purchaser? But the value given is said to make the difference; value, however, in law, is not merely money or land exchanged. Marriage is just as binding a consideration, and one just as valid to exclude claims of subsequent onerous creditors, as money price or excambion. Then, suppose the heirs of tailzie and provision to take under a marriage contract estates to which they were alioquin successuri, why are they to collate more than the heir who gave value in money? They may not have given the consideration themselves, but their parents or other ancestors who contracted the marriage upon the faith of the settlement gave value,—they executed the highest and most binding consideration known to the law. Nay, we may put the case of a settlement by which the father on his son's marriage makes him heir of tailzie and provision, failing himself—the common case—then the son must collate this, though he had given just as high, if not a higher, consideration than if he had paid a sum of money, in respect of which his father had executed an entail, making him institute. I have stated these difficulties without pretending to say that they weigh against the decision under review, so as to make me think it erroneous; but they make me anxiously desire farther light upon its principles than I can find in the reasons of the learned judges by whom it was pronounced. Their lordships rely entirely upon the Little



Gilmour case in 1809, which is entitled to very great deference, no doubt, both as having been most ably supported in argument and as having now stood for above a quarter of a century unimpeached by decision, though how far approved and how far acted on in practice we are not informed. The able argument of Lord Meadowbank in that case, full on many points, does not give me the light I desiderate upon the points to which I have adverted, and which I deem the main difficulties that encumber the question. Nor can I close my eyes to the manner in which a very high authority, Mr. Erskine<sup>1</sup>, treats the subject, and which, though he gives no very explicit opinion upon the general question, and refers chiefly to the case of heirs portioners, and the decision in Ricarts v. Ricarts, yet so expresses himself as to leave no manner of doubt in my mind that the rule in the Little Gilmour case would have been to him a great surprise. Lord Meadowbank, in his able and ingenious commentary on the case of Ricarts v. Ricarts, does in no way meet the authority of Mr. Erskine, nor his reason for that decision, namely, that the heirs portioners succeeding to the heritage by the father's entail or destination takes from one having full power over that heritage as well as over the moveables,—a reason just as applicable to a son upon whom the father entails lands to which he was alioqui successurus. It is certain that the learned judges have stated the Little Gilmour case to give only the same law with former decisions. I have examined these older cases without being able to satisfy myself clearly and fully that it is so. The case of Murray v. Murray, in 1678<sup>2</sup>, comes the nearest to it without touching it, while the case of

ANSTRUTHER  
v.  
ANSTRUTHER.  
15th Apr. 1835.

<sup>1</sup> 3 Ersk. 9, 3.

<sup>2</sup> 23rd July 1678; Mor. 2374.

ANSTRUTHER <sup>v.</sup> Rae Crawford v. Stuart <sup>1</sup> is far from going to that extent in my apprehension. As for the Scotstarvit case<sup>2</sup>,  
 15th Apr. 1835. or Balfour v. Hay, it goes much further if we take it to the full extent, and further than I can conceive any one would think of holding to be law; for it sanctions the position that there is collation wherever the heir takes, whether alioqui successurus or not. On the points themselves, however, and on the question whether or not the case of Little Gilmour was one of the first impression, I have no occasion now to decide. I only was desirous that in sending back this important and difficult question to the Court below for the benefit of a further consideration than it has as yet received, either now or in 1809, and by all the learned judges, the light in which its merits have appeared to me should be accurately known.<sup>3</sup>

It is declared by the House of Lords, That the House (by consent of parties) forbears hoc statu to pronounce any decision upon the matter of the said appeal; but it is ordered and adjudged, That the said cause be remitted back to the said Second Division of the Court of Session, with an instruction to the Judges of that Division to order the matter of law in question in this cause to be heard before the whole judges, including the Lord Ordinary, and to pronounce judgment according to the opinions of the majority of such whole judges.

SPOTTISWOODE and ROBERTSON—RICHARDSON and  
 CONNEL,—Solicitors.

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<sup>1</sup> 3rd Dec. 1794; Mor. 2384.

<sup>2</sup> Balfour v. Scott, 15th Nov. 1787; Mor. 2379 and 4617; Hailes, 1032 and 1048.

<sup>3</sup> On the remit to the Court of Session the case was heard in presence of all the judges, and the following opinions delivered:

*Lords President, Balgray, Gillies, Mackenzie, Corehouse, and Fullerton.*

“ The question remitted by the House of Lords for the reconsideration of

this Court is, whether the heir at law, taking the heritage of the predecessor by succession, or, what is equivalent, *præceptione hæreditatis*, can be admitted to a share of the moveable estate, as one of the next of kin, without collating the heritable estate, when it is holden under the fetters of a strict entail? This question, occurring in the simplest and most abstract form, was decided in the negative by an unanimous judgment of the Second Division of the Court in the case of *Little Gilmour*, Dec. 13, 1809,—a judgment which has ever since been considered and acted upon as having settled the law. But in pursuance of the remit, it is proper, in the first instance, to lay that judgment out of view.

“ We think it unnecessary to engage in any inquiry as to the origin of the law of collation between heir and executor, at what period or on what account it was introduced, and, in particular, whether it arose from the collision of the consistorial and the feudal law. There are no materials in our records to throw light on the subject; our earliest law writers, as *Craig* and *Hope*, are silent with regard to it; and we should not have known that the privilege of collation existed before that time, had it not been for a single decision in 1555 shortly noticed by *Maitland* and *Balfour*. Instead of resorting to conjectural history, therefore, for a principle to guide us in this case, it is safer to confine our attention to the rules laid down by our institutional authors of acknowledged authority, or expressly sanctioned by the decisions of this Court.

“ With regard to the persons who are entitled or bound to collate, the following propositions are indisputably established :

“ 1. If the heir at law claim a share of the moveable estate as one of the next of kin, he is bound to collate the heritage. This is the general and fundamental rule.

“ 2. If the heir at law is himself next of kin, and if there are no kindred in the same degree, there is no place for collation, for he is both heir and executor.

“ 3. In the case of heirs portioners being themselves exclusively next of kin, there cannot be collation, for they are all heirs and all executors.

“ 4. Heirs portioners being in the same degree of kindred with others not heirs portioners, the former, claiming a share of the moveables, are bound to collate with the latter.

“ 5. One of the next of kin, not being heir at law, may take his share of the moveables, and is not bound to collate, though he should succeed to the whole heritable estate by destination.

“ 6. The heir at law, not being one of the next of kin, is not entitled to collate.

“ Proceeding next to the subject of collation, it is established on similar authority that the heir who shares the moveables, and who is bound to collate, must collate the heritage vested in the predecessor, and transmissible by succession; and therefore, conversely, that he is not bound to collate what is not heritage, what is not vested, and what is not so transmissible. The rule is laid down to this effect, and in unqualified terms, by all the text writers, and in none of them is there an allusion to any distinction arising from the subject being holden under a destination or under no destination; and if under a destination, from the nature of the destination, as whether it be to heirs whatsoever, to heirs

ANSTRUTHER  
v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ male, to heirs of tailzie, to heirs of provision, or to heirs of a marriage.

“ If any such distinction existed it was unknown to Stair, to Stewart, to

“ Bankton, and to Erskine, for if it had been known to them it was too

“ important to have remained unnoticed.

“ Let us consider, then, the grounds on which the appellant contends

“ that the estate now in question, which was heritage vested in the person

“ of the defunct, and which has passed to the appellant by succession;

“ should be exempted from the general rule, to which none of the text

“ writers knew of any exception.

“ In an early stage of the cause the appellant maintained that collation

“ takes place only in the case of intestate succession, understanding by

“ that term, it is thought, what the heir succeeds to by the act of the law,

“ independently of any deed or conveyance executed by the defunct or

“ his predecessors. That position is plainly erroneous, and is now admitted

“ to be so. He is bound to collate, without distinction, property which

“ has not been made the subject of destination, as heirship moveables, a

“ personal right to land under a minute of sale, and the like, and property

“ which is holden under the most express destination in the investiture.

“ Thus he must collate an estate conveyed by the defunct to himself and

“ his heirs whatsoever; or to himself, whom failing, to his eldest son

“ nominatim, and the heirs of his body; whom failing, his heirs what-

“ soever. If the completion of a feudal investiture in the ancestor, con-

“ taining a destination, were to bar collation, there are few estates in

“ Scotland which would not be exempted from it. The distinction be-

“ tween intestate succession and succession by destination is therefore

“ plainly untenable.

“ Afterwards the appellant's argument took a different form, and it

“ was maintained that the subject of collation is that to which the heir

“ succeeds in the character of heir at law exclusively, or that which it is

“ said he inherits in fee-simple. Some misapprehension seems to have

“ arisen here from the use of an ambiguous term. In the law of Scot-

“ land ‘ fee-simple ’ has two significations. Sometimes it means a

“ fee destined to heirs at law, in opposition to a tailzied fee; for example,

“ a fee taken to heirs male, heirs of a marriage, or other heirs of provision.

“ Sometimes it means an absolute fee, in contradistinction to a limited

“ fee, that is, a fee holden under conditions or fetters. If the term is

“ employed in the first sense, it is inconceivable how it should form the

“ ground of any distinction in the question of collation. Whether the

“ eldest son, for example, takes an estate, being an absolute fee, as heir

“ at law of his father or as heir male of his father, his situation in

“ reference to that estate, and his rights over it, are identical. In

“ either case the investiture may have been framed by the father him-

“ self, or it may have been framed by an ancestor more remote; but

“ in both it is to his father to whom he succeeds, and to whom he

“ must enter heir. His powers and liabilities, after he has entered,

“ are the same in both; he may gift, he may sell, he may burden, he

“ may alter the investiture at his pleasure, and by the very same means.

“ In both he takes by an universal and not a singular title, and in both

“ the effects of his representation are the same. It is not necessary

“ with us, as it is in England, to convert the fee tail by fine and recovery,

“ or by any act whatever, into a fee-simple, that the heir may enlarge  
 “ his powers over it, nor is it possible for him to enlarge his powers  
 “ by any such act. If he dies without disposing of it otherwise, it  
 “ goes to his heir male, just as if he dies without disposing of a fee-  
 “ simple; otherwise it goes to his heir of line, or his heir of conquest,  
 “ as the case may be. He cannot alter the succession of the tailzied  
 “ fee on deathbed, but neither can he alter the succession of the fee-  
 “ simple. Then why should he not collate what he takes by the force of  
 “ an investiture in the one case as well as in the other; the thing which  
 “ he has taken being absolutely the same as to use, disposal, liability, and  
 “ every other conceivable attribute of ownership? And the case is the  
 “ same whether the fee is tailzied to a man and the heirs male of his body  
 “ alone, or to a hundred extraneous substitutes in the male line. What  
 “ is said of a tailzie to heirs male applies to every other species of  
 “ tailzie, the destination being unfettered, and the heir general suc-  
 “ ceeding under it; for example, a tailzie to heirs whatsoever, excluding  
 “ heirs portioners, to the children of a particular marriage, excluding other  
 “ children, or, what is quite competent by the law of Scotland, a tailzie  
 “ to a series of individuals, excluding the heirs of every one of them.

“ As a tailzied fee, unfettered, is indisputably a fee-simple as to every  
 “ right in the person of the heir, so it presents as little difficulty in ap-  
 “ plying the rules of collation as a fee standing to heirs whatsoever. Thus,  
 “ if the heir of tailzie claims a share of the moveable succession, no con-  
 “ veyance, nor any other act on his part, is requisite to enable the  
 “ next of kin to obtain a share of this estate. Though he refuses  
 “ to execute a disposition, by simply taking a part of the executry, he  
 “ incurs a debt to them, which they may render effectual by a decree of  
 “ constitution and a charge to enter, followed by an adjudication. It  
 “ may be added, that the very same steps would be necessary on the part  
 “ of the executors, if the estate, instead of being destined to heirs of  
 “ tailzie, were destined to heirs whatsoever, and if the heir, with a view  
 “ to avoid collation, should refuse to make up titles, and to dispo-

“ But it is needless to enlarge upon this point, which seems to have  
 “ created some difficulty in the House of Lords, because it is distinctly aban-  
 “ doned by the appellant himself. He admits that whatever is the form of  
 “ the title,—whether the investiture stands to heirs whatsoever, or whether  
 “ it contains a special destination to heirs of provision,—yet, if the deceased  
 “ had the full power of disposing of it during his life, it must be collated.  
 “ ‘ Where the deceased,’ he observes, ‘ has held an estate in fee-simple,  
 “ ‘ and over which, during his life, he had the full power of disposal, the  
 “ ‘ heir-at law must collate it, though the investiture may have been one  
 “ ‘ of special destination, instead of leaving the succession to be regu-  
 “ ‘ lated by the mere operation of law. But this peculiarity, namely,  
 “ ‘ where the heir at law must take in form as an heir of provision an  
 “ ‘ estate which the ancestor held in fee-simple, and which, without ad-  
 “ ‘ verting to the particular form of the investiture, he has allowed to  
 “ ‘ descend to his heir at law, is just one example of the more general rule,  
 “ ‘ that the form of the title makes nothing against the truth of the case,  
 “ ‘ and the rights of parties thence arising.’ (Appellant’s case, p. 7.) This

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER v. ANSTRUTHER.  
 15th Apr. 1835.

“ is in some measure to reverse the argument, as it was put at first, holding that the subject of collation is the heritage which does not descend ab intestato to the heir, but which he takes in virtue either of the express or implied will of the deceased. If the deceased has made an unfettered investiture under which his heir general takes in the first instance, it is admitted to be of no moment whether that investiture be conceived in favour of heirs general or heirs of tailzie or provision. And, in like manner, if he allows an investiture made by a remoter ancestor to remain unaltered when he had the power of altering it, which gives the estate, in the first instance, to his heir of line, this is said to be equivalent to a donation by himself to his heir of line, it being the indirect expression of his will to that effect. The admission is very material; it discards from the argument all pleas resting on the form of the destination, as whether it is simple or tailzied, and on the circumstance whether it was framed by the deceased or by a remoter ancestor; and puts the case on the point, whether the deceased had or had not the power of disposing of the property, which on his death has devolved on his heir at law as in his right. Stating the question in this general and abstract form, it is plain that it must be answered unfavourably for the appellant. There are many well known instances in which the deceased has no power to alter the investiture, whether standing to heirs general or heirs of tailzie, in which collation undoubtedly takes place. The investiture may have been framed by a remote ancestor, and the deceased, who succeeded and made up his titles, may have died in minority, or he may have been insane from the time he succeeded till his death, or he may have succeeded while he was on death-bed. In all these cases the heir takes independently of the will of the defunct. In some of them the defunct is incapable of having any will upon the matter; and in others his *enixa voluntas*, distinctly expressed, may have been, that the heir at law should not take. Thus, if the late Sir John Carmichael, who died in minority, had held any lands as in absolute fee, whatever might have been the destination, the law holding that he could express no will with regard to them, would have allowed them to descend in terms of the Earl of Hyndford's or of Sir John Anstruther's investiture; and if Sir Wyndham took them as heir under that investiture, he must have collated. It is in vain, therefore, to contend that the criterion of collation is, whether the estate was or was not taken by the express or implied will of the ancestor.

“ These preliminary observations have been thought necessary to clear the case of much irrelevant matter which has been introduced into it, and to raise the question of law on which parties are properly at issue, namely, Whether the estates in question are not subject to collation, because they are not absolute but limited fees? If the case of Little Gilmour is not to be held a precedent, this question requires very careful consideration.

“ The general rule of law, as already stated, being, that all heritage in the person of the deceased is subject to collation, and that rule being laid down by every authority, without qualification or exception, it is incumbent on the appellant to show why the lands in question, which,

“ though strictly entailed, were heritage in the person of the deceased,  
 “ should not fall under it. He attempts to do so on various grounds.  
 “ First, he maintains that heritage, in the sense of the text writers, is  
 “ heritable property; but that an estate holden under the fetters of a  
 “ strict entail is not the property of the heir, because he has no power  
 “ to alienate, burden, or alter the order of succession. The criterion of  
 “ ownership, he says, ‘ is the liability of the estate for the proprietor’s  
 “ ‘ debts;’ and, as the heir in possession of the entailed estate cannot  
 “ affect it with his debts, therefore it cannot be considered as his  
 “ estate.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ If there be any point undoubtedly settled in the feudal law of Scot-  
 “ land it is this, that the heir of an entailed estate, however strictly  
 “ limited or fettered, as soon as he completes his titles, becomes the  
 “ proprietor of that estate. Before he enters, the fee is in the hæreditas  
 “ jacens of his predecessor. He takes it up by special service, the mode  
 “ by which feudal property is transmitted from the dead to the living, or  
 “ by some equivalent form. The inquest declare that the predecessor  
 “ died vested and seised as of fee, and that the claimant is the next heir,  
 “ and entitled to be infeft. When he is infeft he becomes the vassal,  
 “ not by a singular but by an universal title. If he refuses to enter, the  
 “ superior can compel him to do so by means of a charge of horning  
 “ under the statute. In consequence of his entry all the rights of a  
 “ vassal open to him, all the obligations of a vassal are incumbent upon  
 “ him, and all the feudal incidents fall in his person. Were it other-  
 “ wise, the fee of a strictly entailed estate might remain in pendente for  
 “ centuries, contrary to an axiom or fundamental principle of the feudal  
 “ law. When we say that a strictly entailed estate is a limited fee, we  
 “ do not mean that it is limited as to its integrity, for all and every part  
 “ of the fee is in the heir who has entered. No fraction or shadow of a  
 “ real right is vested in any of the substitutes, who are merely personal  
 “ creditors, having power in that character to enforce the conditions of  
 “ the grant. It is in respect of those conditions that the fee is said to  
 “ be limited; for if the heir does not comply with them, he exposes him-  
 “ self to the danger of forfeiting his right, that is, of being divested of  
 “ the whole fee, which before was wholly in him. In the words of the  
 “ revised case for the Marquis of Chandos, now at avizandum before the  
 “ Second Division of the Court<sup>1</sup>, ‘ The title by which the estate is held,—  
 “ ‘ the powers which may be exercised in regard to it,—the legal provi-  
 “ ‘ sions that are payable out of it,—the mode of constituting securities,  
 “ ‘ whether legal or voluntary, over it,—its liabilities for the debts of ap-  
 “ ‘ parent heirs,—the operation against it of the statutory certification on  
 “ ‘ a charge to enter heir,—the application of the law of treason in  
 “ ‘ regard to it,—and the manner by which it descends to, and the title  
 “ ‘ by which it must be taken up by, the next successors; in not one of

<sup>1</sup> This case involving the same question of collation, arising out of the succession to the estates of the Marquis of Breadalbane, had a similar result as the present one, and has been appealed.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ ‘ these particulars is there the shadow of distinction in point of principle’  
 “ ‘ between an estate held under the strictest entail and the present  
 “ ‘ instance of an estate in fee-simple. Both estates may be restricted  
 “ ‘ and qualified in various respects by burdens, and there may be a cer-  
 “ ‘ tain degree of peculiarity in that special class of burdens which more  
 “ ‘ immediately form the characteristic of an entailed estate. But in all  
 “ ‘ that relates to the essence of the matter—in all that enters radically  
 “ ‘ and fundamentally into the constitution of the estate itself, or in any  
 “ ‘ respect touches the inherent character of the right and title of its  
 “ ‘ proprietor, or of those succeeding to him, there is not so much as an  
 “ ‘ iota of difference.’

“ All this is so familiar to every one acquainted with the feudal law  
 “ of Scotland, that the statement of it here may be thought superfluous,  
 “ and the proof by authority or precedent would certainly be inexcusable.

“ That the *jus disponendi*,—that is, the power to alienate or burden,—is  
 “ no test of ownership, is a point equally clear. On the contrary, it is ex-  
 “ cluded by the very definition of that right in the law of Scotland, as  
 “ well as in that of Rome. ‘ Property,’ says Erskine, (Book ii. tit. 2. sec.  
 “ 1.) ‘ is the right of using and disposing of a subject as our own, except  
 “ ‘ in so far as we are restrained by law or paction;’ and this is exactly  
 “ the language of the civilians, who define dominium to be ‘ *jus in re*  
 “ ‘ *corporali ex quo facultas de ea disponendi, eamque vindicandi, nascitur,*  
 “ ‘ *nisi vel lex, vel conventio, obsistit.*’

“ In the case of a strict entail there is a convention between the en-  
 “ tailer who frames it, and the institute or heir who takes under it, that  
 “ the latter shall not have power to alienate or contract debt,—that is,  
 “ the entailer disposes it under these conditions, and the institute or  
 “ heir, by his entry, accepts the estate under these conditions, and becomes  
 “ bound to comply with them. This convention, express or tacit, is  
 “ authorized and rendered effectual against third parties by the statute  
 “ 1685, and consequently the right of the heir, notwithstanding the re-  
 “ strictions to which it is subject, comes under the express legal definition  
 “ of the right of ownership.

“ But the argument is put by the appellant in a form at first sight  
 “ more plausible, and it is the ground on which he now chiefly, if not  
 “ exclusively, relies. He says, granting that the heir of a strict entail,  
 “ when entered, is the proprietor of the entailed estate in point of form  
 “ and in correct legal language, nevertheless in substance and reality he is  
 “ nothing more than an usufructuary; in equity, therefore, he ought not  
 “ to be called on to collate his interest under the entail, on the same prin-  
 “ ciple that he does not collate heritage, which, under the disposition of  
 “ the ancestor, he holds in life-rent. In illustration of this principle, he  
 “ refers to the case of *præceptio hæreditatis*, when the heir is forced to  
 “ collate what he has acquired, not by a universal but by a singular title,—  
 “ what he has not succeeded to by a deed *mortis causa*, and in consequence  
 “ of the predecessor’s death,—in reality, what he has not succeeded to at  
 “ all, but what was conveyed to him by a deed *inter vivos*, and while the  
 “ ancestor was alive. In that case, it is said, the substance and not the  
 “ form of the right is regarded, that the executor may get equity from the



“ heir in opposition to the strict rule of law, and therefore he must give equity to the heir in the present case on the same principle.

“ To begin with the illustration,—the appellant’s inference would have had some colour if the doctrine of preception had been introduced into the law of Scotland for the sole purpose of equalizing the interests of the heir and executor in the case of collation, for it might then have been considered as an interposition of equity to remedy the defect of the general and strict rule of law. But that is not its origin. The doctrine of præceptio runs through the whole law of succession ; for if the real estate or any part of it is propelled by the ancestor during his lifetime to his heir alioqui successurus, without a valuable consideration, the subject so taken shall be accounted inheritance, and to a certain extent shall infer representation and liability for debt. The heir receives it by a universal, not a singular title; it constitutes a succession, and not a gift, and is no contravention of a prohibition to alienate under which the ancestor may have been laid. In accordance, therefore, with this rule of universal application, and without any reference to equity in the particular case of collation, the heir must communicate what he has taken præceptione.

“ The doctrine of præceptio, therefore, though affecting collation, as well as every other department of the law of succession, affords no analogy for holding a limited fee as equivalent to a life-rent, though in some, but indeed in very few respects, they may be similar. In truth, the common law of feudal succession uniformly resists the intervention of equity to temper or modify its rules. Thus, if a brother dies infeft in lands, his sister-german succeeds ; if he has omitted that ceremony, his brother consanguinean takes the estate. Thus, in the case of heirs portioners, if one dies infeft, her sister-german is preferred to the other heirs portioners, being consanguinean only. Thus, if an heir portioner dies, leaving a child who dies uninfeft, his aunts, the other heirs portioners, succeed ; but if the child has been infeft, the estate does not go to them, but to the child’s brother or sister consanguinean, if he has any, and if he has not, to his father ; or, failing him, to his father’s heir general, however remote. What is it that sends the succession into channels so widely different, in these instances, contrary to every feeling of equity and every principle of natural justice? Nothing but the mere ceremony of passing an infeftment, which may be done without the knowledge or consent of the heir, and sometimes, as in the case of an infant, when he is incapable either of knowledge or consent. But if the mere ceremony of infeftment produces such extensive and important consequences in all the ordinary cases of heritable succession, is it surprising, in the case of collation, that the circumstance of being seised or not seised in the fee should produce similar effects?

“ The doctrine of collation itself affords many remarkable instances of the strict exclusion of equity in applying the rules of feudal succession, as to which there is now no dispute. If the defunct, though in possession for more than three years, and therefore capable, under the statute, of burdening the estate with his debts, shall remain unentered, his eldest son and heir at law, making up a title to the lands, may take a

ANSTRUTHER  
v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ share of his moveables without collation ; but if he has passed an infeftment, his heir at law is bound to collate. It is in vain to say that in the one case the defunct is proprietor of the estate, and in the other that he is not. That is true, but it is the very same circumstance which imposes the obligation on the heir of entail having completed his titles, and by so doing having rendered himself proprietor. If equity were to interpose to relieve the heir of entail from collation, e converso it should interpose to make the successor of the apparent heir liable to that burden. A distinction resting on the naked ceremony of infeftment alone ought not to be adhered to in the one case and abandoned in the other.

“ So also, had equity been regarded, a younger son succeeding to the whole heritage of the defunct by destination would at least have been equally bound with his elder brother, the heir of line, to collate.— Here, in like manner, it is in vain to argue that there is an analogy between the younger son and the heir of entail, because they both inherit, not by the act of the law, but *provisione hominis*. It has been already observed, that although the heir at law takes an unlimited fee by a deed of provision not made by his immediate predecessor, who from circumstances might never have possessed the power of altering it, he is nevertheless bound to collate. The analogy, therefore, entirely fails, while the strict rule of law, contrary to every equitable view, bestows a privilege on the younger child which it withholds from the elder, the heir *alioqui successurus*.

“ Another illustration of the danger of resorting to equity may be found in the case of a grandson by the eldest son deceased representing his father, and coming into his place, who has not the privilege of collation which was competent to his father. Here the equity is so manifest, that even Mr. Erskine was led to hazard an opinion, in the absence of precedent, that the grandson was entitled to the privilege ; but the Court soon after decided otherwise.

“ But even if equitable considerations were admissible, or, in the words of the appellant, if the substance and not the form of the right were to be regarded, it would not avail him. The right of an heir in possession of an entailed estate is generically different from that of a life-renter, to which the appellant resorts for an analogy. When the heir of entail has completed his title, as already observed, he is *fiar* in every respect ; but no infeftment which the life-renter can take, no ceremony which he can perform, will vest a fee in him, or any thing of the nature of a fee. His powers are different from those of a *fiar*—his liabilities are different—his life-rent is incommunicable *inter vivos*, and intransmissible by succession. In the language of the civilians, *inhæret ossibus usufructuarii*.

“ The appellant pleads, that, since it is conceded that the fee of an heir of entail is limited, on that ground alone he should be exempted from the burden of collation, which he assumes to exist in the case of absolute fees exclusively. But there is no ground for that assumption. The reverser, the wadsetter, the appraiser before the legal has expired, the owner of every other redeemable right, the *fiar* burdened with a life-rent

“ or any other incumbrance, or with a clause of pre-emption, or an obligation of real warrandice, are all vested with limited fees; not absolute proprietors, but subject to restrictions more or less extensive, according to the nature of their respective rights; yet all these fiars are indisputably bound to collate. Nay, it has been decided that a tenant under a lease for years, who, according to modern ideas, has no feudal fee in him at all, whose right is not only limited as to duration, but restricted to one among all the various uses of property, if he, being heir at law, take the lease by succession, is bound to throw it into the fund of division before he can obtain a share of the executry;—a decision resting on the general canon of the law of collation, so often referred to, the lease, though not a fee, being heritage in the person of the defunct.

“ Next, it is said that the heir of entail is not the heir of his predecessor who last entered under it, but of the remoter ancestor who framed the entail, and that he does not take by legal succession but *provisione hominis et secundum formam doni*; and then again, not very consistently, that he does not take as an heir at all, but as a purchaser, and by a singular title.

“ But an heir of entail does not enter by his service to the maker of the entail, except in the solitary case when the maker is his immediate predecessor. The statute 1685 expressly declares that he shall serve himself heir to the heir who died last infeft in the fee, and did not contravene, that is, whose right was not evacuated by forfeiture. By service he necessarily becomes an universal and not a singular successor, for it is a contradiction in terms to say that a right transmitted by service is not a right of inheritance, but a right by purchase. By his service he represents the deceased, to whom he succeeds in all his rights and all his obligations, in so far as those obligations are not prevented from attaching upon him by the act of the law itself. In other words, he must fulfil every obligation of the deceased which is not prohibited and declared to be null by the entail, a prohibition and irritancy which the statute has rendered effectual. He is not liable *ultra valorem* for obligations not prohibited, for the same reason that the heir of a simple destination is not liable *ultra valorem*, if he enter *cum beneficio inventarii*, or on a precept of *clare constat*; but under the protection of the statute he is the heir of the person last infeft, therefore he does not take by a singular title. To say that he takes *provisione hominis et secundum formam doni*, is to say nothing more than that he takes in terms of the investiture, in the same manner as the heir whatsoever, or any other heir of a simple destination, takes in terms of the investiture. The heir *alioqui successurus* succeeding, not by virtue of an investiture to heirs whatsoever, not in the character of heir at law, but by virtue of a deed of provision, by a service as heir of provision, *et secundum formam doni*, in terms of his deed, is nevertheless bound, if unfettered, to collate. That was explicitly admitted in the case of Little Gilmour, and is as explicitly admitted here. But if the fetters of an entail create no distinction in this matter any more than any other incumbrance on the fee, or any other limitation of the

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835,

ANSTRUTHER  
v.  
ANSTRUTHER.  
—  
15th Apr. 1835.

“fiar’s right, as we think we have satisfactorily shown, it is plain that the  
“combination of these two pleas, aided with the groundless assumption  
“that the heir in possession is the heir, not of his immediate predecessor,  
“but of the maker of the entail, must be entirely unavailing.

“Great weight is laid by the appellant on another view of his case,  
“presented sometimes by itself, and sometimes in support of the pleas  
“which have been already considered. Granting, it is said, that the  
“substitutes under a Scotch entail have neither the fee nor any portion  
“of it vested in them, in which respect their situation is altogether dif-  
“ferent from the remainder-man of an English fee tail, still they have  
“a right of credit to the estate, not feudal indeed, but personal, which  
“entitles them to demand that the entail shall be recorded, to insist  
“in declarators of irritancy, and to take other steps for enforcing the  
“fettors; and that right is not derived from their predecessor, but con-  
“ferred upon them directly by the entailer. Further, it is a right which is  
“frequently not gratuitous, but purchased with a price; for example, the  
“execution of the entail may have been stipulated in a marriage contract,  
“marriage being confessedly an onerous consideration. If the son pur-  
“chase the estate from his father, or from a third party, for a sum of  
“money, and obtain a disposition to it, he is not bound to collate it; and  
“therefore, by parity of reason, it is said he ought not to be required to  
“collate in the case supposed. This view seems to have occasioned con-  
“siderable difficulty in the House of Lords.

“But the law of Scotland affords an obvious, and, it is thought, an in-  
“vincible answer. The substitute, as already mentioned, has no right to  
“the fee; his right is to succeed to the fee as an heir, and therefore  
“under the obligations which attach to an heir. As a personal creditor  
“he is entitled to nothing but to enforce the conditions of the grant;  
“and unless he actually obtain a decree of irritancy the heritage remains  
“in the defunct, and as heritage, therefore, must be collated. No per-  
“sonal claim which the heir can have against his father can prevent col-  
“lation of what he takes from his father by inheritance, although it may  
“indirectly and ultimately render the subject which he has collated less  
“valuable. An heir so situated must collate the estate under its burdens,  
“and so does the heir of entail when he collates his fee, which is a limited  
“fee. It is true the heir is not bound to collate a subject which he has  
“purchased from his father, if by the terms of the purchase it is to be  
“conveyed to himself. But if he has not purchased the subject, but only  
“a right to succeed to the subject, as heir of his father, and when, there-  
“fore, it is not to be conveyed to himself, but to his father in fee, whom  
“failing, to himself, such purchase is no bar to collation. So it is in the  
“case of a marriage contract, in which, for example, the father of the  
“bridegroom, being a party, binds himself to the bride and her relations  
“that he shall execute an entail of his estate in favour of himself; whom  
“failing, of his son; whom failing, the heirs of the marriage, in considera-  
“tion of the marriage, and of the portion of the bride, conveyed to the  
“married pair. This was stated to be a settled point as early as 1678,  
“in the case of Murray (Mor. 2374), and it was not disputed on the  
“other side of the bar. The question arose in the case of *præceptio*, the

“ father having put forward a tenement to his son ; but it is said that ‘ it  
 “ ‘ is ordinary for fathers in their sons’ contract of marriage to infeft them  
 “ ‘ in their whole heritable estate, whereby there remained no heritable  
 “ ‘ succession, and yet they were never admitted to partake of the  
 “ ‘ moveables, but were excluded as heirs per præceptionem hæreditatis.’  
 “ Thus in the à fortiori case, where the father, an obligant in the contract  
 “ of marriage, and bound to make a provision for his heir, instead of  
 “ leaving the heir to succeed to that provision, actually put him into the  
 “ fee in fulfilment of his obligation, no doubt was entertained, for it was an  
 “ ordinary case that the son was bound to collate. There is another case  
 “ in 1680 where the same principle is recognized: ‘ By contract of mar-  
 “ ‘ riage the lands being provided to the heir by the first clause, and the  
 “ ‘ conquest to the bairns in a subsequent clause, the lords found the heir  
 “ ‘ had a share in the conquest (though it was most part executry), without  
 “ ‘ collation, because he was also a bairn.’ (Brown, July 21, 1680, Mor.  
 “ 2975.)

“ In that case collation was excluded, not because the heir had a jus  
 “ crediti to the lands under the marriage contract, which, if the appellant’s  
 “ argument were well founded, would of itself have been conclusive, but on  
 “ a totally different ground, namely, that by another clause of the con-  
 “ tract the father had bound himself to give the children, and therefore the  
 “ heir, being one of the children, the conquest of the marriage, which was  
 “ chiefly moveable. A father has at all times the power of excluding  
 “ collation ; but he does so by conveying to the heir a share of the moveables,  
 “ which, unless so conveyed, would have gone to the executors ; and it  
 “ is plain from the ratio decidendi that if the father had left personal estate  
 “ which was not conquest of the marriage, and therefore not falling under  
 “ the second clause of the contract, the heir could not have claimed a share  
 “ of it without collating his lands.

“ Thus, it appears that a jus crediti in an heir (even although it be not  
 “ acquired by gift, but for an onerous consideration,) to succeed to his  
 “ predecessor’s heritable estate, does not relieve him from the obligation to  
 “ collate ; nor is he relieved though the predecessor, in fulfilment of his  
 “ obligation, chooses to propel the succession by a deed inter vivos.

“ It has been said that the heir is not bound to collate a fee strictly  
 “ entailed, because he cannot alienate the lands to the executors without  
 “ the risk of incurring an irritancy. If it were so, the consequence would  
 “ be, as is well laid down in the Little Gilmour case, that he would never  
 “ get a share of the personal property at all, because he could not comply  
 “ with the condition under which exclusively he is entitled to that share.  
 “ But it is undoubted law that the heir collating is not bound to convey to  
 “ the executors an absolute fee. He must share the heritage with them, sub-  
 “ ject to all the burdens under which he himself has taken it. There is  
 “ nothing to prevent him to convey to them a right to the lands or to their  
 “ produce, defeasible in the event of his own death, or of a decree of  
 “ irritancy being obtained against him. This is no contravention, if the  
 “ decision in the case of Nairne, (Feb. 15, 1810,) and the ordinary  
 “ practice of the Court in dealing with entailed succession, can be relied  
 “ upon. If not, certainly there is no impediment to his sharing the pro-

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER  
v.

ANSTRUTHER.

15th Apr. 1835.

“ duce of the tailzied estate with the executors ; and if they consent to  
“ hold that as collation, it is enough. It is a case *à fortiori* in their  
“ favour, that he is not able to pay all the price which ordinarily they  
“ receive for a communication of their right to the moveable succession.

“ We are of opinion, therefore, that the general principles of the law of  
“ Scotland afford no ground for holding a fee limited by strict tailzie, more  
“ than any other limited fee, to be exempted from collation, or for suppos-  
“ ing that it forms an exception to the rule laid down by the institutional  
“ writers, in absolute terms, as applicable to all heritage whatever in the  
“ person of the defunct, descending to the heir *alioqui successurus*. Neither  
“ do the decisions of this Court, or of the House of Lords, exhibit a trace of  
“ evidence that such an exception was ever recognized. The cases of  
“ Murray and of Brown, on the contrary, as we have just seen, negative  
“ the plea that heritage, because it is taken in virtue of a deed of provision,  
“ or because the heir who takes it has a *jus crediti* to the succession, is  
“ exempted from the rule. The case of Scotstarvit shows that lands  
“ holden under a special destination or tailzie fall under it. And in the  
“ case of Rae Crauford (Dec. 3, 1794), where the estate was strictly  
“ entailed, it follows, by plain inference from the interlocutor of the  
“ Court, that if the lady had been heir of line, which she was not,  
“ but only heir of provision, which by itself imposed no such obligation,  
“ she would have been bound to collate.

“ That neither the case of Rickarts nor that of Scotstarvit can afford aid  
“ to the appellant is, in our opinion, sufficiently obvious. In the former,  
“ it was impossible that there could be collation, because the succession did  
“ not divide into separate channels. All the daughters were heirs at law,  
“ and all of them were executors. The fundamental principle of the law  
“ of collation is, that the heir who is excluded from the moveables shall  
“ purchase a share of them by throwing the heritage into the common  
“ fund. But in the case of heirs portioners, each, *de jure*, has a share of the  
“ moveables, and therefore the eldest has no occasion to purchase that right.  
“ And this was only a repetition of the judgment pronounced in the case of  
“ Jack many years before, where the Lords found that there was no colla-  
“ tion to be made by the law of Scotland but only in the case of moveables,  
“ which, according to Gosford's report, was looked upon ‘as a constitute  
“ ‘ custom, without all controversy or debate.’ The case of Scotstarvit, so  
“ far from giving any countenance to the appellant's plea, affords a direct  
“ precedent against one of his arguments ; for the Court held that an  
“ estate taken by the heir at law *provisione hominis*, and that provision  
“ made not by the immediate but a remoter ancestor, was liable to be  
“ collated equally as if the investiture had stood to heirs whatsoever. It  
“ might be inferred from the report that the eldest heir portioner was  
“ found by the Court liable to collate, not only with her cousin Mr. Hay  
“ Balfour, but with her sisters, the other heirs portioners ; but that was  
“ not the case. It appears from the session papers that the action was  
“ raised at the instance of Mr. Hay Balfour alone against Miss Scott,  
“ and though her younger sisters were directed to be made parties, they  
“ withdrew from the contest.

“ An ingenious view was thrown out by Lord Meadowbank, in the

\* case of Little Gilmour, as to the extent of the subject which Miss Scott  
 “ was bound to collate with the Balfours, the other executors. His lord-  
 “ ship observed, that she was undoubtedly bound to collate that portion  
 “ of the inheritance to which she was heir alioqui successura; but that  
 “ it might be questioned whether she was bound to collate the other two  
 “ thirds to which her sisters were heirs, for those two thirds were given  
 “ to her by destination alone; and with regard to them, that she did not  
 “ seem to have been in a different situation from a second son, or any  
 “ other heir alioqui successurus who is not bound to collate what he takes  
 “ by destination; and he states the ground on which he holds it was  
 “ successfully maintained that the collation should extend to the whole  
 “ subject. It may be thought by some, on reading this part of the  
 “ report, which is somewhat obscure, that his lordship has been more  
 “ successful in raising the doubt than in solving it. Be that as it may,  
 “ that point in the case does not touch the present in the remotest degree.  
 “ This is not a case of heirs portioners, where no one is heir alioqui  
 “ successura exclusively; nor is it a case where the executors are con-  
 “ tending, not with an heir, but what may be called an aliquot part of  
 “ an heir. Here the appellant, as in the ordinary case, has the whole  
 “ character in himself, and he is at issue with those who are exclusively  
 “ executors. It is likely that Mr. Erskine, the learned author of the  
 “ Institute, might not have approved of this decision, in so far as the  
 “ last-mentioned point is concerned, or in so far as it was plainly  
 “ erroneous in holding moveable succession to be regulated by the *lex rei*  
 “ *sitæ*; but in so far as it found that the heir must collate though he  
 “ takes *provisione hominis*, it is in strict concurrence with what he him-  
 “ self lays down, what all his predecessors laid down, what the Court  
 “ considered as settled in the case of Murray, and what, as Sir Wyndham  
 “ Anstruther is now compelled expressly to admit, is the established law  
 “ of Scotland.

“ The views which we have taken might be illustrated and enforced by  
 “ much additional argument and a citation of various other authorities  
 “ and decisions; but we consider this to be unnecessary, as the question  
 “ is in our opinion ably argued in the respondent’s appeal case, and still  
 “ more fully and elaborately in the revised case for the Marquis of  
 “ Chandos and others, now at *avizandum* before the Second Division of  
 “ the Court, to which we beg leave to refer.

“ Having, in obedience to the remit from the House of Lords, treated  
 “ this as an open question, we must now advert to one consideration  
 “ which, in our humble but very decided opinion, ought alone to set the  
 “ matter at rest. We allude to the decision in the case of Little Gilmour,  
 “ pronounced, as already mentioned, by the Second Division of the Court  
 “ in December 1809. That decision was as solemn and deliberate as the  
 “ forms of this Court allow. It was unanimous; it was acquiesced in  
 “ by the parties; it has been subsequently followed by one other decision  
 “ at least to the same effect, and one other case at least of great impor-  
 “ tance has been extrajudicially settled upon the faith of it. To disturb  
 “ such a precedent would, in our apprehension, be contrary to principle,  
 “ and might be attended with the most disastrous consequences. It is no

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.



ANSTRUTHER v. ANSTRUTHER.  
 15th Apr. 1835.

“ impeachment of the authority of that judgment, that it was pronounced  
 “ by a Division of the Court, and not by the whole Court. Many thou-  
 “ sand decisions have been pronounced since the judicature act in 1808,  
 “ when the separation took place, by one Division, without any communi-  
 “ cation with the other. Those decisions are all the country has to rely  
 “ on as the established law of Scotland in the matters to which they  
 “ relate, and on them the country does rely. Still less is it an objection  
 “ that the judgment in Gilmour’s case was never sanctioned by an  
 “ affirmance of the House of Lords. Were that essential, considering  
 “ how extremely few cases comparatively are appealed, it would go near  
 “ to upset the whole common law of Scotland. In questions of inter-  
 “ national law, such as that we have just alluded to in the case of Scots-  
 “ tarvit, namely, whether the succession of moveables should be regulated  
 “ by the law of situs or domicil, if the Court of Session err, it is the pro-  
 “ vince and duty of the House of Lords to set them right, and that  
 “ although the judgment may have been again and again repeated; for  
 “ it is not the law of Scotland, but the *jus gentium*, which the House of  
 “ Lords has there to administer, and as to which the Court below is not  
 “ equally authoritative. The same thing may be said of some questions  
 “ in the law merchant, which it is expedient should be uniform through-  
 “ out the empire, indeed throughout commercial Europe. But if a  
 “ point occurring purely and exclusively in the municipal law of Scotland  
 “ cannot be ruled with authority by a judgment of this Court, in either  
 “ of its Divisions, especially when confirmed by subsequent judgments,  
 “ and regarded and acted upon as settled for a quarter of a century, the  
 “ people of Scotland would be deprived of what they have been taught to  
 “ consider as the safeguard of their most important rights.

“ *Lord Moncreiff*.—I concur in the foregoing opinion. I certainly  
 “ cannot think that it is an open question; because I have long considered  
 “ it as settled by the case of Gilmour, and can never think that no point  
 “ of municipal law can become settled unless it has been determined in  
 “ the House of Lords. But if the question were open, I agree in every  
 “ word of the above opinion, and should be prepared to deliver the same  
 “ judgment if it were a case of first impression. I think that the prin-  
 “ ciples laid down are in all points sound; and the exposition of the  
 “ manner in which these principles are to be applied to the present case  
 “ appear to me to be clear and satisfactory: I could only express my  
 “ own opinion by writing the same thing in other words. I beg leave,  
 “ however, only farther to observe, that the argument of the appellant has  
 “ been brought almost directly to an avowal of a principle, that the  
 “ interest of an heir of entail, in possession of a Scotch entailed estate, is  
 “ little better than a life-rent, and that the entail of a Scotch estate does  
 “ differ in substance from a trust, with a succession of life-rents; and  
 “ that, if the case does at all depend on any such assumption, I can only  
 “ say, that it is contrary to all the principles and fixed rules of the law of  
 “ Scotland, as they have been uniformly recognized both by this Court  
 “ and by the House of Lords. But, whether the argument be pushed  
 “ so far as this or not, I am of opinion that it is a point of settled law,  
 “ and that, if it were not settled, it ought to be settled in the same  
 “ manner.



“ *Lord Jeffrey.*—If I could consider the question as entirely open, I  
 “ should have some hesitation about concurring in the preceding opinion,  
 “ and certainly could not bring myself to regard it as so clear and simple  
 “ as it is there represented.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ The difficulty of the case I take to be this:—The fundamental  
 “ principle of the whole law of collation being that the obligation (or  
 “ right) attaches only to heirs of line, it seems to follow, almost as a  
 “ necessary conclusion, that they should collate only what they take in  
 “ that character. Certainly they can be called upon to collate nothing  
 “ that was not vested in the ancestor to whom they stood in that relation,  
 “ and nothing that has not come to them on a proper title of succession  
 “ to that ancestor; and this being the case, it seems difficult to suggest a  
 “ reason why they should ever collate more than has actually descended  
 “ to them in virtue of that relation. If the whole question were open,  
 “ therefore, I conceive there could be little doubt that this is the rule by  
 “ which it should be governed. But it seems to have been long settled  
 “ that collation may be required in many cases, where the heir of line  
 “ takes the heritage which was in his ancestor, not by a service in that  
 “ character, but as heir of provision or investiture, and by the act of a  
 “ predecessor in the fee; and it is said that the case of an heir of entail  
 “ is not substantially different.

“ There is no doubt that those cases are exceptions to the literal or  
 “ peremptory application of the rule; but it appears to me that they  
 “ may still be reconciled to its principle; and that, except only in the  
 “ case of a strict entail, there are grounds upon which it may be held,  
 “ though perhaps not without some aid from hypothesis and construction,  
 “ that what is thus collated is always truly taken in the character of heir  
 “ of line.

“ Where a fee is taken simply to a man and his heirs whatsoever, it is  
 “ entirely at the disposal of the fiar in possession; and if he makes no  
 “ disposition, it will go to his heir of line: not, however, it is conceived,  
 “ upon any view of public policy, but *ex presumpta voluntate* of the  
 “ defunct, and on the supposition that such heir is the person he most  
 “ inclined to favour. But if this be the ground of the heir of line's right  
 “ of succession where the fee in the ancestor was altogether unlimited, it  
 “ is easy to see that it may be held to be the same where it was only  
 “ limited in such a manner as to leave him the full right and power of  
 “ disposal. If he have power to change an existing investiture, under  
 “ which the fee would be carried, in the first instance, to his own heir of  
 “ line, then his not exercising that power may be held to be exactly  
 “ parallel to his not making any disposition, in the case of a fee absolutely  
 “ unlimited; and the heir of line may be held to take the succession, in  
 “ both cases, *ex presumpta voluntate* of his predecessor, and truly in his  
 “ character of heir of line, because in consequence of the favour which  
 “ the law holds to attach to that character. The predecessor, in short,  
 “ may be held, in both cases, to have adopted and made his own the  
 “ destination, of the common law in the one, and of an earlier ancestor in  
 “ the other, out of love and affection for his natural heir; and he may  
 “ therefore be regarded as owing his succession, in the latter case as well  
 “ as in the former, to his possessing that character.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ But if the other cases of apparent exception may be reconciled in  
 “ this way to what I cannot but consider as the principle and natural  
 “ rule of law, it is plain that such an explanation will not serve for that of  
 “ a strict entail, where the heir in possession has no power whatever  
 “ either to defeat or confirm the succession of the other substitutes. The  
 “ cases of personal or accidental incapacity, as from minority, insanity, or  
 “ individual paction, do not seem to have any application. There the  
 “ inability to alter arises, not from the quality of the right, but from the  
 “ circumstances of the persons. As fiars, they have full power, though,  
 “ as individuals, they may be disabled from exercising it.

“ The case of heirs of a marriage is more perplexing, and certainly  
 “ comes nearest to that of a strict entail. Yet it is not exactly parallel;  
 “ since the fiar, though under a personal obligation not to disappoint the  
 “ succession of such heirs, is not absolutely disabled, by the quality of  
 “ his right, from so doing. He may accordingly sell or burden the  
 “ settled lands, though he will be answerable in his general estate for the  
 “ value.

“ But though doubts may be thus raised, and plausible distinctions  
 “ suggested, if the question as to heirs of entail could really be considered  
 “ as open, I am bound to say that I have no such confidence, either in the  
 “ grounds of doubt or the sufficiency of the distinctions, as would induce  
 “ me now to depart from such a precedent as that of Gilmour, and that  
 “ upon this point I entirely agree with the other judges. Whether I  
 “ should have concurred in that judgment at the time it is impossible for  
 “ me to say; but it seems to me plain, that by now adhering to it no  
 “ clear or consistent principle or rule of practice in the law of Scotland  
 “ will be violated, or any thing, indeed, effected by altering it, but the  
 “ substitution of one solution of a nice and perplexing question instead of  
 “ another. It being quite settled that heritage, not taken on the proper  
 “ title of an heir of line, is yet liable to collation, it was not perhaps an  
 “ unwise course to disregard subtle distinctions between particular cases,  
 “ and to decide generally for such liability, wherever an heir of line took  
 “ by succession the heritage vested in his predecessor. At all events this  
 “ was the course adopted, certainly not without the greatest possible  
 “ consideration, in the case of Gilmour, nearly thirty years ago; and I  
 “ cannot think it safe or advisable now to disturb it upon speculative  
 “ doubts and difficulties. It is matter of notoriety that it has ever since  
 “ been regarded, and acted upon, as settling the law.

“ *Lord Cockburn.*—I concur in the foregoing opinion.

“ *Lord Justice-Clerk.*—In obedience to the order of the House of Lords,  
 “ pronounced in this case, the question of law was most fully and ably  
 “ argued before the whole judges; and as the judgment ordered to be  
 “ reviewed had been pronounced by this Division, we thought it right to  
 “ require the opinions in writing of the judges of the First Division and  
 “ permanent Lords Ordinary, in order that judgment may, in terms of  
 “ the order, now be pronounced, ‘ according to the opinions of the majo-  
 “ rity of such whole judges.’

“ Those opinions are now before the Court, and they unanimously  
 “ concur in holding, in substance, that the judgment of this Division of  
 “ the 28th of November 1833, finding, ‘ that Sir Wyndham Carmichael

“ ‘ Anstruther cannot claim any share in the executry of the late Sir John  
 “ ‘ Carmichael Anstruther, without previously collating the heritage to  
 “ ‘ which, as heir of Sir John, he has succeeded,’ is well founded, and  
 “ ought to be adhered to ; so that, even if all of us present were now of a  
 “ contrary opinion, such must be the deliverance of the Court.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ Directed, however, as we all were by the House of Lords, to have the  
 “ matter of law deliberately argued, I have, in common with your lord-  
 “ ships, paid every attention to the able arguments of counsel, and the  
 “ various authorities referred to by them. But, so far from being shaken  
 “ in the opinion I had formerly entertained upon the case, I have been  
 “ more and more confirmed in it by all that I have heard from the bar,  
 “ and since read in those most able and elaborate pleadings that have been  
 “ laid before us in the important question, embracing the same point, that  
 “ has arisen between the Marchioness of Chandos and her brother the  
 “ Marquis of Breadalbane, relative to the succession of their late father,  
 “ and which also stands for judgment in this day’s roll.

“ I am not at all surprised that the argument for Lady Chandos has  
 “ attracted the marked attention of the judges, who have favoured the  
 “ Court with a full opinion in this case, because it does contain a most  
 “ masterly and satisfactory examination of the whole principles of law that  
 “ are applicable to this question, and which are expounded in a way to  
 “ remove, in my opinion, all room for doubt or hesitation as to the man-  
 “ ner in which it ought to be determined, if the law of Scotland is to rule  
 “ the decision.

“ Concurring, therefore, as I most entirely do, in the luminous expo-  
 “ sition which is given in the opinion of the Lord President and the  
 “ other judges who concur and subscribed it along with him, I should  
 “ consider it as an unpardonable and useless encroachment on the time of  
 “ the Court were I to attempt to state in more imperfect language those  
 “ views of the case which I entertain, and which in that opinion are so  
 “ clearly and admirably expressed.

“ But as some notion seems to have been entertained, that in pronoun-  
 “ cing our judgment in this case in November 1833, we proceeded  
 “ merely upon the authority of the case of Gilmour, I shall, in my own  
 “ vindication, now read the notes of the opinion which I then delivered,  
 “ as deliberately formed, and to which I now adhere in every respect,  
 “ after all the investigation that the case has since undergone. These notes,  
 “ which are now before me, are in the following terms :—‘ Upon consi-  
 “ ‘ dering these cases, in which the Lord Ordinary has taken this cause to  
 “ ‘ report, (and which are drawn with great ability, and particularly that  
 “ ‘ on the part of Mrs. Anstruther,) raising the question whether an  
 “ ‘ heir of tailzie, who is at the same time heir of line of the deceased,  
 “ ‘ is bound to collate his interest under the entail before he can claim  
 “ ‘ a share of the executry of the deceased, as one of his next of kin, I  
 “ ‘ have formed a most satisfactory opinion, that, according to a fair  
 “ ‘ review of the whole authorities in our institutional writers and  
 “ ‘ decisions, that question must be answered in the affirmative.

“ ‘ The question indeed was so fully discussed, both by the bar and  
 “ ‘ the bench, in the case of Gilmour v. Gilmour, 13th December 1809,

- ANSTRUTHER v. ANSTRUTHER.  
 15th Apr. 1895.
- “ ‘ when the whole train of authority and decision was most thoroughly  
 “ ‘ sifted, and a most elaborate opinion delivered by the late Lord Meadowbank, embracing the whole law of the case, and grappling with  
 “ ‘ every sort of distinction that could be drawn as to the application of  
 “ ‘ the principle of the judgment which was there solemnly and unanimously pronounced against the heir of tailzie and of line who refused  
 “ ‘ to collate, that it appears to me wholly unnecessary to enter at any  
 “ ‘ length into the discussion. That decision has not been altered by  
 “ ‘ a higher tribunal. No contrary decision has since been pronounced,  
 “ ‘ but, on the contrary, the law, as there expounded, has been held as  
 “ ‘ settled and finally fixed. It would therefore have been on no light  
 “ ‘ grounds, and certainly on no thin or fanciful distinctions as to the  
 “ ‘ circumstances of particular destinations of entails, that I, for one,  
 “ ‘ would have been disposed to depart from that judgment.’
- “ ‘ But upon full consideration, however, of the argument in those  
 “ ‘ cases, I have seen no reason to doubt of the soundness of the decision  
 “ ‘ in the case of Gilmour, which establishes that the doctrine of collation  
 “ ‘ does attach to an heir of entail, and who is also heir of line of the deceased, claiming, as one of the nearest of kin, share of his executry.  
 “ ‘ I must therefore be for preferring Mrs. Anstruther to the whole fund  
 “ ‘ here in medio.’
- “ ‘ I abstained at that time from enlarging more on the grounds of my  
 “ ‘ opinion, because I held then that in the arguments and opinions in the  
 “ ‘ report of the case of Gilmour, every thing was to be found that was  
 “ ‘ necessary for the sound decision of the cause. And upon reconsidering  
 “ ‘ that report, with the admirable opinion of the late Lord Meadowbank,  
 “ ‘ in which the Lord President, the late Lords Polkemma, Newton, and  
 “ ‘ Robertson concurred, not to mention the high authority of my brother  
 “ ‘ on my right hand (Lord Glenlee), I do maintain that there is to be  
 “ ‘ found in it the basis of every thing that has since been urged in the late  
 “ ‘ elaborate discussion of the question, taxed as the abilities of the bar and  
 “ ‘ the bench have been in regard to it.
- “ ‘ If, then, a case, after having been argued by the first counsel at the  
 “ ‘ bar, so well considered and so solemnly determined as that of Gilmour,  
 “ ‘ and which has universally been ever since held to have settled the law in  
 “ ‘ that department, and has been repeated, as it certainly was by us in the  
 “ ‘ case of Straiton, as I find from my notes, and so long acted upon by  
 “ ‘ the country at large, is to be departed from and overturned, merely  
 “ ‘ because the whole Court was not then consulted, or an affirmation of it  
 “ ‘ pronounced on appeal, it may well be asked, Where is there security for  
 “ ‘ any of the legal rights of the people of Scotland?
- “ ‘ Lord Glenlee.—I am one of the number of the judges who concurred  
 “ ‘ in the decision in Gilmour’s case; and if I was satisfied of the soundness  
 “ ‘ of that decision then, I am still more so now, from the able argument  
 “ ‘ that has since been laid before us. I am clear as to the propriety of  
 “ ‘ adhering to our former decision.
- “ ‘ Lord Meadowbank.—As I, upon a former occasion, stated my opinion,  
 “ ‘ it would be a waste of time to enter into the matter now. I concur in  
 “ ‘ the opinion of the consulted judges; but I would not be doing justice

“ to myself if I were not to add, that I never read a more able and satisfactory argument, or one which more exhausted the subject, than in the case for the Marchioness of Chandos.

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ *Lord Medwyn.*—I am in the peculiar situation of not having previously had an opportunity, as all your lordships have had, of giving any opinion in this case. I reported it at once from the Outer House, without even hearing counsel in the cause, as I was told it was intended to argue the point upon principle, to contest the decision of Little Gilmour's case, and call for a judgment in the last resort. Your lordships, along with my predecessor in the Inner House, Lord Cringletie, pronounced the decision which was appealed from, and then delivered your opinions. When the case came back for the opinions of the whole Court, I had in the meantime become a member of the Division, and not being one of the consulted judges, had it not in my power to join in their deliberations nor subscribe their opinion, but was under the necessity of studying the case, and forming my opinion alone, and unassisted by those mutual consultations which take place on these occasions. I accordingly studied the case in the vacation, and drew up my opinion before I had seen the opinion of the consulted judges, or even knew of their unanimity. Upon seeing that opinion, as I concur in every word of it, I was much inclined to content myself with simply announcing that I acquiesce in it, and indeed for some time I had determined to do so; but, on farther reflection, lest it should be supposed that I assented merely from the weight of authority, without due consideration, or the necessary study in a case remitted from the House of Lords for the deliberate opinion of the whole Court, I am induced to request permission to occupy somewhat of your time, when I submit the opinion I have come to (and I am sorry to say I have not been successful in making it a brief one), after a very patient examination of the authorities; and I only hope, seeing I profess my entire assent to every word in the opinion of the great majority of the consulted judges, that nothing that I may say shall diminish the effect which that opinion ought to have in the ultimate decision of this case.

“ The parties have, in their pleadings, discussed at some length the origin of collation between heir and executor, and its introduction into our law. But, like other points in our legal antiquities, the materials for elucidating the inquiry are few, and some of doubtful authenticity; and, in truth, any such inquiry is of little practical value as a guide for the decision of the present question, nor if it were *hujus loci* to discuss it am I competent to do so; but it may reasonably be assumed that the privilege of collation is a consequence of the law of primogeniture, and that primogeniture was introduced among us along with the feudal system. We may conjecture, that prior to this the Saxon laws which prevailed in the southern district of Scotland were gradually introduced into other parts of the country, and that land was then divided equally among the sons, to the exclusion of the daughters, as it was in England by the Anglo-Saxon law. The feudal law did not exist in England in a complete state till the conquest; and it was probably received among us, and gradually extended throughout the country, from the example

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ of our neighbour ; for it sprung up among us with that peculiar feature,  
 “ unknown to the feudal law of Lombardy and the other feudal states  
 “ of Europe, which had been adopted in Normandy, and transplanted at  
 “ once into England,—the law of primogeniture, by which the eldest son  
 “ succeeded to the whole feudum, which he held of the superior for the  
 “ performance of the feudal services, to the exclusion of the other sons.  
 “ (Giannone Ist. di Napoli, L. 11. c. 5. § 1. Craig, L. ii. D. 13. § 31.;  
 “ Hallam, vol. i. p. 186. 197. 201.) At first, probably, and till this  
 “ right was fully recognized as the privilege of the eldest son, we may  
 “ conjecture that what is stated to be ‘*consuetudo in burgis Scotiæ de*  
 “ ‘*quo non extat memoria in contrarium*’ was the rule throughout the  
 “ country at large, that the eldest son had the same portion of the move-  
 “ able goods of his father as the other children, with the addition of the  
 “ heirship moveables. (Ll. Burg., c. 124. 125.) But when it came to be  
 “ firmly settled that the eldest son took the whole heritage, custom seems  
 “ to have introduced it as a reasonable and equitable consequence (for we  
 “ have no statute either for the one or the other), that the moveables be-  
 “ came the portion of the younger children, which it will be afterwards  
 “ seen came to be the rule in burghs also ; so that finally, if the heir was  
 “ named executor, he was considered in the same light as a stranger, and  
 “ had the privileges of such. (Stair, b. iii. t. 8. § 53.) As with us, not  
 “ merely the landed proprietor’s or baron’s eldest son was his heir, but  
 “ the beneficed clergyman and the burgess enjoyed the same distinction,  
 “ it would probably happen in so poor a country as Scotland was in ancient  
 “ times, that in the case of the two latter classes, rather than in the suc-  
 “ cession of the baron, the eldest son would sometimes find his a less  
 “ lucrative succession than if he shared his father’s succession equally with  
 “ the younger children. To obviate such an inequality, the doctrine of  
 “ collation was introduced by the Church Courts, and perhaps first in the  
 “ succession of churchmen, from considerations of equity, in the same way  
 “ as in other instances they adopted rules of equity to soften the strict  
 “ provisions of the common law ; for the churchmen, in their judicial  
 “ capacity, were the great masters of equity in those times. Of course,  
 “ the same privilege would be extended to heirs of barons and burgesses  
 “ also, and hence it came to be a rule of our law, that the heir, being one  
 “ of the next of kin also, was permitted, in the case of intestate succession,  
 “ to claim an equal share in the moveables, provided he contributed or  
 “ collated the heritable estate, to which he succeeded as heir to his father  
 “ or predecessor, to whom he and the other children were alike next of  
 “ kin, and in which estate his said father or predecessor was vested. This  
 “ was early the rule with us, and perhaps it may be illustrated by refer-  
 “ ring to a statute of Robert III. c. 35. in an analogous case, *de collatione*  
 “ *hæreditatis divisæ inter plures sorores*, the earliest notice of the term  
 “ collation, I believe, in our law. The discussion related to the division  
 “ of heritage among heirs portioners, where a daughter had got a portion  
 “ of land from her father in his lifetime ; and as collation had been intro-  
 “ duced by the Church Courts in questions within their cognizance, that  
 “ is, the moveable succession, and was merely consuetudinary, as it had  
 “ probably not previously occurred to be considered in the Civil Court how

“ far it was applicable to any other case, the controversy, arising of ANSTRUTHER  
 “ course under a brieve of division, was therefore referred for determina- v.  
 “ tion to the King, who thus states the argument for the party wishing ANSTRUTHER.  
 “ to exclude the necessity of collation:—‘ Quod non est de hæreditate  
 “ ‘ patris sui; unde pater suus non fuit saisitus tempore mortis sue.’  
 “ Hence we may conclude that it was then admitted law that the father  
 “ being infeft at the time of his death, and the heir then taking up the  
 “ succession from him, was the criterion which rendered the heir bound  
 “ to collate, when he claimed a share of the moveables.

15th Apr. 1835.

“ But the obligation to collate has not been confined to the heir of  
 “ line when he takes the estate by service in that character; and it is  
 “ admitted, that to obtain a share of the moveable succession with the  
 “ other next of kin, the heir of line must collate, although he holds the  
 “ estate præceptione hæreditatis, or as disponent mortis causa, or although  
 “ he succeeds in virtue of an unaltered destination by the deed of a remote  
 “ ancestor, or under a marriage contract. It is contended, however, that  
 “ if the heir of line succeeds to and takes a strictly entailed estate, he can  
 “ claim a share of the moveables without being obliged to collate, on the  
 “ ground that he has not succeeded, has taken nothing by the death of  
 “ his predecessor, but succeeds by the will of a remote predecessor, whose  
 “ heir of line he may not be, at all events does not take in that character;  
 “ for it is said to be highly anomalous, and irreconcilable with any sound  
 “ principle, to call upon one who takes no benefit as heir of line, but who  
 “ succeeds in another character altogether, to bear a burden applicable  
 “ only to the heir of line. But it is obvious that this difficulty does not  
 “ affect the case of an heir under a strict entail alone; it applies equally  
 “ to the case of an heir male taking the estate under a simple destination.  
 “ He also takes in virtue of the deed of the original granter of the dis-  
 “ position; he owes nothing to any act of the immediate predecessor to  
 “ whom he serves heir, and it may be equally said that it is in form only  
 “ that he can be considered as his heir. Yet, as already observed, in this  
 “ case it is not disputed that collation applies. It may be difficult to  
 “ assign a sound principle, or any principle at all for this; and perhaps  
 “ we must rest satisfied with the fact itself, and the probable reason which  
 “ engrafted it upon our practice. Mackenzie (Works, vol. ii. p. 488.) in  
 “ his Treatise on Tailles, says, that in the noted case of the Earl of Cal-  
 “ lander v. Lord John Hamilton, ‘ The Lords thought that the heirs of  
 “ ‘ taillie were una et eadem persona cum defuncto,’ which is also Craig’s  
 “ opinion (Lib. 2. D. 13. § 27.) as well as that of Stair and Erskine,  
 “ (Ersk. b. 3. t. 8. § 51.) as to a feudum novum seu masculinum; and  
 “ accordingly on this principle it was held that ‘ heirs of tailzie and pro-  
 “ ‘ vision are liable universally, in suo ordine, for the debts of the deceased,  
 “ ‘ and not barely to the extent of the succession.’ Indeed, with our  
 “ feudal notions and preference of male succession, this was natural enough.  
 “ In the direct line a destination to heirs male gave the estate to the heir  
 “ of line, and even when it carried the estate past the heir of line to  
 “ a hæres factus, it was natural enough that he should be viewed in  
 “ the same light as the heir he had superseded. Now, this being the  
 “ light under which such heirs were viewed, when it happened that



ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

“ there was no heir of line to limit and qualify the effects of this universal representation, and when they themselves had the character of heir of line, and would have taken the succession as such, is it at all to be wondered at that they should have been held liable to fulfil this condition of collation in favour of the younger children, if they claimed any of the privileges of heir of line? The heir male, by succeeding to the heritage, is excluded from any share of the moveables, and if he claims a share, he uses a privilege competent to him as heir of line, and it is natural that this should be subject to the same burden as in the case of one having the character of heir of line, and no other; and the circumstance mentioned by Mackenzie (vol. ii. p. 484.), that ‘tailzies in favour of heirs male are now more ordinary than tailzies in favour of heirs whatsoever,’ probably confirmed our judges in applying this burden in the case of the heir of line, who took the estate not in that character, but as heir male or of destination, from the evident hardship upon the younger children, if they were obliged to surrender a portion of their scanty funds to their elder brother, who was already amply provided by his succession to the whole landed property of their father. But whether this be the reason or not, it is admitted that collation applies to the case of an heir under a simple destination to heirs male, when he is also heir of line and one of the next of kin.

“ Now if, instead of succeeding under such a deed, the heir of line succeeds to his father or predecessor as heir under an entail, which effectually prohibits alienation and the other modes of disappointing his succession, why should this have any influence on the privilege of the younger children to call upon the heir to collate, if he claims a share of the moveable succession?

“ It does not appear that when the act 1685 sanctioned strict entails, so as to secure the estate of a father to his son free from the claims of creditors or purchasers, it could be contemplated that it was in any other way to affect the interest of the heir, and still less of the younger children, either to deprive the heir of his right to participate in the moveable succession, if he found it for his interest to do so, or, on the other hand, to authorize him to claim a share without collating or contributing, if not the estate as a fee simple, at least the value of his succession. That the predecessor had only a restricted right in the estate, and not the fullest powers of property in it, does not deprive him of the character of proprietor: he is vested in the estate—he is infest as fiar, and not as life-renter—his right in it can be adjudged from him only by an adjudication of the lands themselves, not of his life interest in them—on his death they fall into the estate of his hæreditas jacens, till they, the lands themselves, are taken out of it by the service of the heir to him; and the heir further proceeds to vest himself with the estate in the same manner as if it were an estate in fee simple, that is, by service to the person last infest. In so far, then, as the heir takes these lands, he takes them by succession to his father or predecessor, to whom he is heir; and there seems to be no principle for any distinction as to collation between the case of the



“ predecessor having the power of disappointing the succession, or not  
 “ having such power. Collation was fully recognized when the proprietor  
 “ had no such power. It was necessary even in 1672 to provide that the  
 “ superior was bound to receive an adjudger as vassal, and a voluntary  
 “ purchaser could not compel this till 1748. A proprietor dying minor  
 “ cannot alienate his estate, and the heir must succeed and would succeed  
 “ as heir of investiture; it may be in virtue of the deed of a remote ances-  
 “ tor, whose heir of line he may not be, yet collation would be necessary  
 “ before such heir could claim a share in the moveable succession of the  
 “ minor with the other next of kin.

ANSTRUTHER  
 v.  
 ANSTRUTHER.  
 —  
 15th Apr. 1835.

“ In the case where the proprietor might have altered the destination,  
 “ but has not done so, it does not seem to be the ground why collation  
 “ applies, because it may be held that the estate comes to the heir by the  
 “ forbearance or implied will of the predecessor: no such reason is assigned  
 “ in any of our law books, and the law has not said that the heir is to  
 “ collate only what devolves upon him by the will or forbearance of his  
 “ predecessor, but what comes to him by succession on the predecessor's  
 “ death, and in which he was vested, what, in short, ‘ he succeeds to as  
 “ ‘ heir’ to him.

“ Hence the heir claiming the moveables may not be the heir of line of  
 “ the original vassal, or of the maker of the destination, or of the entail;  
 “ it is enough that he is the heir of line of the person last vested with the  
 “ estate, and, succeeding to him as heir by service, claims to share his move-  
 “ ables with the other next of kin. For nothing but the entailing clauses  
 “ prevent an heir of entail from being liable by representation for the  
 “ debts of the preceding heir, and if the ceremony of recording be omitted  
 “ the entailing clauses will not protect him from this liability to the cre-  
 “ ditors of the preceding heirs, (Earl of Rosebery, 22d June 1765,) at  
 “ least in valorem of the estate, (Baird, 15th July 1766,) so that it seems  
 “ of no consequence that he succeeds independent of the will of his pre-  
 “ decessor: he takes in the character of his heir, and must be liable in  
 “ that character as his representative, wherever the entailing clauses do  
 “ not protect him.

“ It must not be supposed that any difficulty arises from the circum-  
 “ stance that the Court, in the case of Baird, 16th July 1766, did not hold  
 “ the heir of tailzie liable universally, but only in valorem of the estate,  
 “ adopting the doubt of Dirleton and opinion of Stewart, instead of the  
 “ opinions of Craig, Mackenzie, Stair, and Erskine; for still the heir of  
 “ tailzie, when effectually fettered, is considered as eadem persona cum  
 “ defuncto, although not liable universally, proceeding on Stewart's view  
 “ of his character, that it is similar to that of an heir entered cum bene-  
 “ ficio, a privilege recently introduced in favour of heirs, the estate itself  
 “ being held equivalent to the inventory. So that he still represents his  
 “ predecessor as his heir, although the effect of the representation is  
 “ limited; and the same reason exactly applies in this case, for making  
 “ such an heir, who is also heir of line, collate, as if the representation  
 “ were universal. His representation as heir still affects the estate which  
 “ he is called upon to collate, although it does not go beyond it.

“ In truth, it arises from the view of this character of an heir of entail

ANSTRUTHER  
v.  
ANSTRUTHER.

15th Apr. 1835.

“ taken by our law that the clause as to making up titles, upon declaring  
“ an irritancy of the heir by contravention, was introduced into the act of  
“ 1685. The heir pursuing an irritancy, or succeeding on an irritancy  
“ being declared by a substitute, although he succeeds, in the strictest  
“ sense of the word, in virtue of the entail, and neither by the will nor for-  
“ bearance of his predecessor, yet, if he made up titles by service to the  
“ contravener which, by feudal forms, he must have done, would have  
“ been liable for his debts and deeds as heir served to him, had not the  
“ statute authorized him to serve to the person last infeft, who did not  
“ contravene. There was no other mode of preventing that representation  
“ and its consequences, incurred by an heir of entail serving heir to his  
“ predecessor in virtue of the original deed of entail, when he is not pro-  
“ tected by the entailing clauses. Now, what is the protection these  
“ clauses were either intended or can possibly be supposed to afford to the  
“ heir? they are to protect the estate from the claims of creditors and  
“ purchasers or disponees; and how can they then be extended so as to  
“ affect the interest of the younger children, and deprive them of their  
“ right to insist on the heir collating? The law must always favour that  
“ claim where the heir is insisting to share with the younger children that  
“ from which his inheritance as heir excludes him, and the entailing clauses  
“ are in no respect directed against any act of the heir necessary for ful-  
“ filling this condition of collation. Indeed, in applying the doctrine of  
“ collation to the case of an entailed estate, I have never thought it an ar-  
“ gument of any weight, in his favour at least, that an heir of entail  
“ cannot collate or contribute the estate itself. It might afford a good  
“ objection against his participating in the moveables, since he could not  
“ fulfil the requisite condition by contributing his share of the father's suc-  
“ cession; but surely this cannot exempt him from collating as much as  
“ he can, if the law shall hold that to be sufficient. He can always con-  
“ tribute, I will not say his life interest in the estate, but the value of his  
“ succession, the yearly rents; or, on the principles of annuities, the value  
“ of this may be computed at once; and to call upon him to collate this  
“ value is giving him all the advantage he can claim as succeeding to an  
“ entailed estate. And I know of no sufficient interest in the younger  
“ children to maintain that they will not be satisfied with this, but must  
“ have the heritable estate carved out into portions and given to them. In  
“ truth, there can seldom be any practical difficulty. The heir has as  
“ little occasion to communicate the estate itself to the younger children,  
“ provided he contributes its value, as in ancient times the heir of a feu-  
“ dum or burgage tenement had. The heir is always to benefit, otherwise  
“ he has no interest to collate. He is to get a portion of the moveables,  
“ in addition to the heritage; so the collation of the heritage is in many,  
“ perhaps in most cases, effected by a simple arithmetical computation;  
“ and there can scarcely exist any interest in the executors to insist on an  
“ actual transference of any portion of the real estate. That the heir will  
“ retain pro tanto, whether he can alienate it or not, and he will obtain  
“ the surplus from the moveable estate to make his share of the succession  
“ equal to that of the other children.

“ It is said, and it is true, that an heir of entail succeeds by the will and

“ destination of the maker of the entail. But what is the entailor's will?  
 “ not to constitute a series of life-renters, whose interests expire at their  
 “ death, and are not taken up and inherited by their successors—who are,  
 “ in short, independent of each other, and dependent solely on himself.  
 “ The law of Scotland gives no such power to a proprietor. Wherever  
 “ there is a life-rent there must be a fee somewhere. But the law has  
 “ allowed the entailor, and his will in the present instance has been, to  
 “ constitute a series of heirs, each holding the fee of the property in suc-  
 “ cession, and each in succession taking it by service as heir to the one  
 “ last infeft, and of course representing him in every act and deed con-  
 “ nected with the estate, except in so far as protected by the entail. In  
 “ succeeding, therefore, though by the will of the entailor, he must be  
 “ liable to all the legal consequences of the exercise of that will in his  
 “ favour; he takes up the fee that was in his predecessor, and is subject  
 “ on that account to the same liabilities as any other heir of provision,  
 “ which the prohibitions of the entail do not exclude. Indeed, if it be  
 “ not inherent in the character of entailed property to exclude the neces-  
 “ sity of collation, I do not know how an entailor could proceed if he  
 “ wished to exclude this condition, and yet give each heir in succession a  
 “ share along with the other next of kin in the moveable succession of his  
 “ predecessor in the estate. He could, no doubt, prevent any of the  
 “ heirs from claiming a share of the moveables, because he could make it  
 “ a condition of the entail that no heir should do so; but how could he  
 “ provide that the heir might share in the moveables without collating?  
 “ These moveables are not his estate, and do in no respect belong to him,  
 “ so as to entitle him to regulate the succession to them. They are the pro-  
 “ perty of the deceasing heir, and may have been the fruits of his industry  
 “ or economy, and the entailor can have no power over them. It is only  
 “ his own estate, the succession to which he can regulate by entailing  
 “ clauses.

“ It has been further argued, that, in this question, the Court attends  
 “ more to substance than to form, and that in form only it can be said  
 “ that an entailed estate is taken up as the estate of the predecessor by the  
 “ succeeding heir; and, in proof of this proposition, reference is made to  
 “ the case of lands taken præscriptiōe hæreditatis, which must be collated,  
 “ although they were given by disposition in the lifetime of the father,  
 “ and not succeeded to as heir. But this instance seems insufficient to  
 “ prove the point for which it is adduced. The very name shows that it  
 “ is the inheritance of the father which the son takes; that he gets it  
 “ because he is heir to it, and would succeed to it at his father's death.  
 “ Hence he is liable to his father's prior creditors for its value; and most  
 “ justly it seems to have been thought as unreasonable that the rights of  
 “ the younger children should suffer by the anticipated right of the heir,  
 “ as those of the creditors of the father; or that the eldest son should get  
 “ quit of his obligation in the character of heir in affecting the interests of  
 “ the younger children, while it is regarded with creditors. But can a  
 “ stronger proof be given that form is, in this matter, at least as much  
 “ attended to as substance, when it is founded on legal principle, that if  
 “ the father never was infeft, although he may have possessed the estate

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER v. ANSTRUTHER.  
 15th Apr. 1835.

" for twenty or thirty years, and his son makes up titles, as he must do,  
 " to the person last infeft, he may claim a share of his father's moveables,  
 " without collating the heritage which he did not take by feudal forms, as  
 " an inheritance from his father. (Spalding, Dec. 11, 1812, in 1 Bell,  
 " 102.)

" The application of the principles on which collation rests to the suc-  
 " cession of an entailed estate did not demand the consideration of the Court  
 " till the case of Little Gilmour. It could only occur after the act 1685,  
 " and it obviously must happen but in rare instances that it can be for the  
 " interest of such an heir to collate. I conceive that, in that decision, the  
 " rules which had been observed in analogous cases with great consistency  
 " were correctly followed out, and I have already anticipated the grounds  
 " on which this opinion is founded.

" The cases on collation are not numerous in our law books. We are  
 " not to look for them at first among the records of our civil courts, nor  
 " perhaps in the earliest institutes of our civil law; for this matter, at an  
 " early period, fell under the cognizance of the ecclesiastical courts. With-  
 " out laying much stress on the passage quoted from the Reg. Maj. in the  
 " case of Mrs. Anstruther, it appears, from the laws of William, c. 22.,  
 " that the church had then a jurisdiction as to testaments and intestate  
 " succession; and, in the canons of the Scottish Church, c. 50., enacted in  
 " 1242, among other delinquents directed to be excommunicated are ' im-  
 " pedientes ordinarios, quominus de bonis ipsorum decedentium ab in-  
 " testato, secundum consuetudinem ecclesiæ Scotticæ, rite valeant  
 " ordinare.' (Hailes, vol. iii. p. 192.) And, in a provincial council,  
 " held at Perth in 1420, the clergy of each diocese were required to  
 " report on oath what was the practice as to the confirmation of testa-  
 " ments; when they unanimously reported, ' that the bishops had been  
 " in the constant practice of confirming testaments, and of naming exe-  
 " cutors to those who died intestate,' and then the order of procedure  
 " and distribution is set forth. (Hailes, vol. iii. p. 249.) This unifor-  
 " mity shows a well-established practice proceeding from an authoritative  
 " source, and referring to ancient practice. The doctrine of collation was  
 " fully established in these ancient times; but the destruction of the re-  
 " cords of our ecclesiastical courts, at the tumultuous period of the  
 " Reformation, leaves little hope for much information from that quarter.  
 " I know of one such record only which has been preserved, the volume  
 " of decrees of the official of St. Andrew's for the archdeaconry of  
 " Lothian, from 1500 to 1551; but I do not know if it throws any light  
 " on this question, whether the vassal ever objected to collate his feu, when  
 " the predecessor had as little power to alienate it as in the case of a  
 " strictly entailed estate, and when the heir succeeded in virtue of the  
 " grant of the superior, the original granter. It appears, however, by the  
 " case of Law in Balfour, that this doctrine was, at some early period,  
 " firmly fixed in our practice. It struck me as singular that this question  
 " should have arisen and been decided at this time in the civil court, and  
 " it seemed as if collation only required the heirship moveables to be  
 " collated. But these points were cleared up on examining the decree  
 " itself. It appears that the parties interested in the succession of

“ Steven Law, a burghess of Edinburgh—that is, the widow, two sons,  
 “ and a daughter—had entered into a reference to arbiters, who pro-  
 “ nounced an award, estimating the property at a certain amount, and  
 “ assigning certain sums to the widow and each of the three children as  
 “ their portions of the succession. Some years afterwards the younger  
 “ son, Alexander, designed writer to the signet, raises a process of reduc-  
 “ tion of this award, citing as a defender Andrew, the son and heir of  
 “ Robert, who was the eldest son and heir of Steven, complaining of the  
 “ award on the head of minority and lesion, and craving to have it set  
 “ aside, and that the defender should be decerned by the Court to pay the  
 “ sum he claimed as his proper share of his father's succession. The  
 “ reduction was of course raised in the civil court, the ecclesiastical court  
 “ not being competent to reduce an award or decree-arbitral. The  
 “ minority is stated to be, and is so found by the Court, That, at the time  
 “ of the reference and award, ‘ Alexander was a pupil proximus infantie  
 “ ‘ of nine or ten years, and had na tutor or curator, whereby he had na  
 “ ‘ persoun nor power to transact ;’ and the lesion is made out, because  
 “ the arbiters had undervalued the property ; and further, had given a  
 “ portion of the moveables to the eldest son, who had succeeded as heir.  
 “ The defender did not dispute the law of collation as here laid down—  
 “ evidently holding it unquestionable—just as little as he did the plea of  
 “ minority ; but he pleaded this defence against the application of the  
 “ doctrine in this particular case, that at the time of his father's death he  
 “ was not the heir, as he had an elder brother at the time ; but the answer  
 “ was held satisfactory, that this eldest son died soon after his father,  
 “ before he had entered heir to his father, or got sasine of his lands, or  
 “ received heirship ; and further, died before the goods were divided ; so  
 “ that Robert came to be heir to his father when the children took up  
 “ the succession, and it was therefore held that he could not claim a  
 “ share in the moveable succession without collating his father's lands.  
 “ This is the subject of the decision reported by Maitland, then a judge  
 “ on the bench, 13th July 1553 and 24th April 1554, M. P. 2365.  
 “ The decree bears, accordingly, that the award was set aside on this  
 “ ground, that the third part of the free funds should have been divided  
 “ into two shares only, because for four years before Robert was heir and  
 “ successor to his father, and ‘ enterit to his landis, heritages, and airship  
 “ ‘ guidis, and therefor, be the lauchfull consuetude and use of our said  
 “ ‘ burgh of Edinburgh, lauchfullie and continuewallie observit and kepit  
 “ ‘ past memor of man, burges airis of the samen aucht nought to haif  
 “ ‘ ony barnis part of geir nor falls them by (besides) thair airship guidis  
 “ ‘ and heritage, without thai wald renunce the samen, and cast it in, and  
 “ ‘ concur with the remanent of the barnis equallie thereintill.’ The  
 “ award is set aside on these grounds ; but the Court does not proceed  
 “ with the adjustment of the pursuer's claims ; that belonged to the  
 “ ecclesiastical court, but ‘ assoiliies the defender, and decerns her (the  
 “ ‘ cause had been transferred against the sister of the original defender)  
 “ ‘ quyte therfra, as it is now libellit, reserving to the pursuer his  
 “ ‘ action for persute therof before quhatsumever judge he pleases, as  
 “ ‘ accords of law.’

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

ANSTRUTHER  
v.  
ANSTRUTHER.  
—  
15th Apr. 1835.

“ The examination of this decree is valuable, because it shows that  
“ this matter was still within the province of the ecclesiastical court, and  
“ accounts for the few notices of this doctrine in our civil courts ; and it is  
“ a declaration of the law past memory of man, that in the case of the  
“ heir of a burgess, he was excluded from a share of the moveable succes-  
“ sion, unless he collated not merely the heirship goods, but the lands and  
“ heritage also ‘ to the which he succeedit throu the deceis of the said  
“ ‘ umquhile Stevin, his father.’ (How Balfour has omitted to notice  
“ that the heir must collate lands as well as ‘ airship guidis,’ I know not.  
“ Maitland includes both in terms of the decree itself.) This description  
“ of the succession to the heritage, which infers the necessity of collation,  
“ is important, when it is considered, that the heir making up titles more  
“ burgi in fact takes the subject in virtue of the original grant, but still  
“ he succeeds through the decease of his father.

“ But the decision would be still more important in the present case if  
“ a burgess at that time had not the power of alienating his heritage, except  
“ of his own acquisition, unless of necessity for debt, after offering it to his  
“ nearest heirs, and when the necessity was proved before twelve of his  
“ neighbours. This was once the law even as remodelled in 1395 (Ll.  
“ Burg., c. 45. 125.); but I will not take upon me to say, because I do  
“ not know the fact historically, that this continued to be observed down  
“ to 1520, the period of Steven Law’s death.

“ As collation was originally consuetudinary, and introduced by no  
“ statute, and as the question occurred relative to the succession of a  
“ burgess of Edinburgh, the pleading of the successful party in the case  
“ of Law most correctly founds upon this doctrine as a consuetude of this  
“ burgh. This was all that was necessary. But the notice of this  
“ decision, both by Balfour and Maitland, contemporary lawyers of the  
“ highest character (the latter then a judge on the bench ; the other  
“ eminently qualified for the task for which he was selected, of drawing  
“ up, or superintending the drawing up, the Practicks, or digest of our  
“ law, by having been official of Lothian before the Reformation, and  
“ one of the first commissaries of Edinburgh after it ; also a Judge of  
“ the Session, and finally its President,) shows that both these lawyers  
“ recorded this decision to sanction the doctrine of collation, which they  
“ then recognized as a general rule of the law of Scotland.

“ If, a century afterwards, Dirleton (v. Collation) really seriously  
“ doubted whether the heir was bound to collate more than the heirship  
“ moveables (and he may have been misled by the way in which the case  
“ of law is given in Balfour), these doubts must have been speedily  
“ resolved by the discussion this subject underwent in the cases of  
“ Buccleuch, 1677, and Murray, 1678 ; and Mackenzie, Stair, Stewart,  
“ Bankton, and Erskine distinctly announce the doctrine of collation as  
“ we now hold it ; in truth, we may safely rest the law of collation upon  
“ the authority of their opinions and the decisions of the Court pronounced  
“ in their time and since, which are singularly uniform and consistent—a  
“ very sufficient foundation for any doctrine of our common law—with-  
“ out seeking the aid of any more ancient authority.

“ For, as to the opinion of Mr. Erskine (B. 3. t. 9. sec. 3.) where he

“ says it is only the legal heir, or the heir ab intestato, who is obliged to  
 “ collate the heritage, I am inclined to think his meaning has been mis-  
 “ understood. It may not be very clearly expressed, for the work was  
 “ posthumous, and did not receive the learned author’s last corrections ;  
 “ but it seems to me that he means only that it is the heir alioqui succes-  
 “ surus who is bound to collate, which is quite true ; and he does not say  
 “ that the heir at law, or he who would be heir ab intestato if there were  
 “ no destination, would be relieved from the necessity of collating if he  
 “ takes by virtue of a destination. Indeed, if this passage is construed in  
 “ the way attempted to be done, it would exclude from collation all estates  
 “ under an investiture, even to heirs whatsoever. This certainly is not the  
 “ law he lays down. He then contrasts the case of an heir with the case  
 “ of heirs portioners, who, in relation to the moveables, are altogether in a  
 “ different situation from an heir succeeding either at law or by destina-  
 “ tion to the heritage, for the moveable estate, ‘ by legal succession, de-  
 “ scends equally to all the daughters ;’ and if the father settles his landed  
 “ estate upon the eldest daughter, having full power so to do, she takes it in  
 “ virtue of that settlement, without affecting in the smallest degree her  
 “ legal claim to share the moveables with her younger sisters. The case of  
 “ the heir is quite different, because he has no legal title to the moveables,  
 “ if he takes the landed estate, unless he collate. I admit, however, that  
 “ Mr. Erskine’s opinion in the same section has not been adopted by the  
 “ Court, where he says that the son should have the same privilege that his  
 “ father would have had ; but it is there only that he seems to have given an  
 “ erroneous opinion on a case which had not then occurred. But even  
 “ were it true that Mr. Erskine’s opinion was as has been supposed, how-  
 “ ever high I rate the opinion of that learned author, I am not inclined, on a  
 “ point of law which had not then occurred for decision, to put it in com-  
 “ petition with that of the late Lord Meadowbank and first Lord Newton  
 “ (I speak only *de mortuis*), when called upon to consider and adjudicate  
 “ the very case.

“ I have no intention of going farther into the decisions as to collation.  
 “ I have already observed, that they are uniform and consistent, and they  
 “ support this proposition, that an heir of provision or tailzie, being also  
 “ heir of line of the preceding heir, can claim a share of the moveables  
 “ with the other next of kin only by collating that estate which would have  
 “ devolved upon him, which he would have taken as heir at law, and to  
 “ which the deed providing it to him has only more effectually secured his  
 “ succession.

“ I believe that in England there is something like this doctrine of colla-  
 “ tion among co-parceners at common law, and in the case of moveable  
 “ succession by the statute of distributions ; and that the succession to an  
 “ estate tail is not, in this matter, attended with the same consequences as  
 “ with us. (Blackstone, vol. ii. p. 191 and 517.) There may be sufficient  
 “ reasons in the varying circumstances of the two countries why the burdens  
 “ under which the heir is entitled to share in the moveable succession should  
 “ not be the same in both ; and in the different distribution of wealth in the  
 “ two countries perhaps it may not be difficult to find a solid reason for  
 “ this difference. But be this as it may, and even if the distinction were  
 “ purely arbitrary, it is of much more consequence that the rules of suc-

ANSTRUTHER

v.

ANSTRUTHER.

15th Apr. 1835.

**ANSTRUTHER**    “ cession should be fixed, and steadily adhered to, when once deliberately  
                    v.        “ laid down, than that in all respects they should be assimilated in the two  
**ANSTRUTHER.**    “ countries. And, upon the whole, it appears to me that the application of  
                    —        “ the doctrine of collation in the case of an entailed estate was correctly made  
15th Apr. 1835.    “ according to the principles of our law, when the question occurred in the  
                    “ case of the succession of Mr. Little Gilmour ; and that it could not be  
                    “ deviated from now without adopting a view of the character of a pro-  
                    “ prietor of an entailed estate totally different from what is recognized by  
                    “ our law, and unnecessarily aggravating the inequality which the law of  
                    “ primogeniture has introduced among us against the interests of the  
                    “ younger children.”



[16th April 1835.]

JOHN M'TAGGART and others, Appellants.

WILLIAM WATSON, Respondent. — *Sir John Campbell—*  
*A. M'Niel.*

*Cautioner, Liberation of — Bankrupt.* — Circumstances in which held (reversing the decision of the Court of Session) that the cautioner for the trustee on a sequestrated estate was not liberated by alleged neglect on the part of the commissioners in detecting fraud and malversation on the part of the trustee.

The estates of the Gorbals Spinning Company, and of Alexander M'Kerlie, as a partner, were sequestrated under the bankrupt statute on the 14th September 1815, and William Jeffrey, accountant in Glasgow, was elected trustee. On this occasion he and the respondent, William Watson, granted a bond in these terms :

“ I William Jeffrey, accountant in Glasgow, con-  
 “ sidering that the cotton spinning and manufacturing  
 “ company carrying on business in Glasgow and Gor-  
 “ bals, sometimes under the firm of the Gorbals Spinning  
 “ Company, and sometimes under the firm of Alexander  
 “ M'Kerlie, and the said Alexander M'Kerlie as a  
 “ partner and as an individual, with concurrence of  
 “ Messrs. Colin Campbell and Company, merchants in  
 “ Glasgow, creditors to the extent required by law,  
 “ having applied to the Court of Session for a seques-  
 “ tration of their whole estates, heritable and moveable,  
 “ real and personal, in terms of the act of parliament

2D DIVISION.  
 Ld Mackenzie.  
 —  
 16th Apr. 1835.

M'TAGGART  
and others  
v.  
WATSON.  
—  
16th Apr. 1835.

“ of the fifty-fourth year of the reign of His present  
“ Majesty, intituled ‘ An act for rendering the payment  
“ ‘ of creditors more equal and expeditious in that  
“ ‘ part of Great Britain called Scotland ;’ the Lord  
“ Ordinary Craigie, officiating on the bills, did, upon  
“ the 14th day of September last, sequestrate the whole  
“ estate and effects of the said cotton spinning and  
“ manufacturing company carrying on business in  
“ Glasgow and Gorbals, sometimes under the firm of  
“ the Gorbals Spinning Company, and sometimes under  
“ the firm of Alexander M’Kerlie, and of the said  
“ Alexander M’Kerlie as an individual, in terms of the  
“ said statute, and appointed a meeting of the said  
“ creditors to be held on Friday the 22d day of Sep-  
“ tember, in the Black Bull Inn Glasgow, to name an  
“ interim factor on the said estate, when I was elected  
“ to that office ; and appointed a second meeting to take  
“ place on Tuesday the 10th day of October current, in  
“ the same place, for the purpose of choosing a trustee,  
“ when I was also elected to that office ; and having  
“ accepted of that appointment, and offered William  
“ Watson, merchant in Glasgow, as my cautioner to  
“ the extent of 1,000*l.* sterling, for my faithful manage-  
“ ment ; with whom as a cautioner the meeting being  
“ satisfied : Therefore I, the said William Jeffrey, as  
“ principal, without limitation, and I the said William  
“ Watson, as cautioner, surety, and full obligant with  
“ and for the said William Jeffrey to the foresaid  
“ extent of 1,000*l.* sterling, hereby bind and oblige  
“ ourselves jointly and severally, renouncing the benefit  
“ of discussion, and our heirs, executors, and successors  
“ whomsoever, that I the said William Jeffrey shall  
“ and will manage the said estate in all respects conform

“ to the statute under which the sequestration was  
 “ awarded, and that I shall and will hold just compt  
 “ and reckoning and make payment to the said cre-  
 “ ditors according to their several claims ranked upon  
 “ the said sequestrated estate, or the trustees or trustee  
 “ that may be afterwards named by the creditors to  
 “ succeed me, for my whole management, receipts, and  
 “ intromissions as trustee foresaid with the property of  
 “ the said estates, or any part thereof, of whatever kind  
 “ or denomination, and wherever situated, which may  
 “ come into my hands as trustee foresaid, and that from  
 “ time to time when required; and we oblige our-  
 “ selves to implement these presents under the penalty  
 “ of 500*l.* sterling attour performance. And I the said  
 “ William Jeffrey bind and oblige me and my foresaids  
 “ to free, relieve, and indemnify my said cautioner of  
 “ the foresaid cautionary obligation come under by him,  
 “ and of all costs,” &c.

M'TAGGART  
 and others  
 v.  
 WATSON.

16th Apr. 1835.

This bond was executed on the 13th of October and on the 7th of December.

Three commissioners were elected in common form.

It was alleged by the respondents, and the fact was not explicitly denied, that at the meeting for this purpose the trustee did not exhibit a statement of the bankrupts' estate, or an estimate and valuation thereof, as required by the 36th section of the statute; nor was any fault found with him on this account. Nor did he once in every three months thereafter exhibit to the commissioners, or insert in the sederunt book as signed by them, a similar state and estimate or valuation.

The trustee having realized funds sufficient for a first dividend before the statutory period, a meeting of creditors was held on the 16th July 1817 when the

M·TAGGART  
and others  
v.  
WATSON.  
——  
16th Apr. 1835.

trustee made a report to this effect, and with the sanction of the creditors he applied for and obtained from the Court of Session permission to pay a dividend, without waiting for the statutory period.

In anticipation of this dividend a state of accounts was made up by the trustee, and submitted to the inspection of the commissioners. On the 2d of August 1816 the commissioners met and audited these accounts. A doquet was attached, subscribed by the commissioners, by which they certified that “ they examined the intrusions of the trustee on the said estate as above stated, in terms of the statute.” The balance of free funds shown in these accounts as remaining for division was 3,614*l.* 2*s.* 8*d.* It was alleged by the respondent that the commissioners in auditing these accounts failed to compare the sums lodged from time to time by the trustee in bank with the sums received by him, or to examine the sums drawn by him, in terms of the 43d section of the act. That it appeared from the accounts that the trustee had been in the custom of retaining in his hands on different occasions large sums belonging to the estate, above the sum of 50*l.* sterling, and for more than the space of ten days; and, in particular, that on the 2d of August 1816 he was possessed of 94*l.* 13*s.* 4*d.*, which he had kept in his hands from the 12th of July preceding, and that this was the smallest sum which he ever had in his hands at any time from the 23d of March preceding. That the commissioners did not animadvert on these circumstances, nor take any steps with reference to them, but approved of the accounts, and found the balance forming the divisible fund to be as the trustee had stated it. That nothing was done at this time to require an account of the interest

accruing on the sums which had been deposited in bank. A scheme of ranking and division was made up, showing the amount of dividend payable to the creditors, at the rate of 2s. per pound, to be 3,602*l.* 9s. 11*d.*, and which exhausted the whole of these funds, with the exception of about 12*l.* This dividend (with the exception to be immediately mentioned) was paid, and the creditors granted a discharge in these terms:—“ Considering  
 “ that since the said trustee was appointed he has col-  
 “ lected such funds belonging to the estate of the said  
 “ Gorbals Spinning Company, and of the said Alexander  
 “ M’Kerlie as an individual partner of that company,  
 “ as will pay us a dividend of 2s. per pound of our  
 “ respective debts, and that, upon an application by the  
 “ said trustee to the Lord Ordinary officiating on the  
 “ bills, for leave to pay the said dividend in terms of  
 “ the said act, the Lord Ordinary appointed the 2d  
 “ day of September current for that purpose; and the  
 “ said William Jeffrey has since exhibited to us full  
 “ and satisfactory statements of his whole intromissions  
 “ up to the date of these presents, together with a  
 “ scheme of division among the creditors. And now,  
 “ seeing that the said William Jeffrey has made pay-  
 “ ment to us, for ourselves or those for whom we act  
 “ respectively, of the said dividend of 2s. sterling per  
 “ pound of our respective debts, conformable to said  
 “ scheme of division, and of which dividend we do  
 “ hereby severally grant the receipt, renouncing all  
 “ objections to the contrary: Therefore we, for our-  
 “ selves and those for whom we act respectively, do  
 “ hereby not only exoner and discharge the said Wil-  
 “ liam Jeffrey, as trustee foresaid, of the said dividend  
 “ of 2s. per pound now paid to us, and of all claims

M’TAGGART  
 and others  
 v.  
 WATSON.

16th Apr. 1835.

**M'TAGGART**  
**and others**  
**v.**  
**WATSON.**  
 ———  
 16th Apr. 1835.

“ and action competent for the same, but also ratify,  
 “ approve, and confirm the whole actings, transactions,  
 “ and intromissions of the said trustee and the commis-  
 “ sioners on their said estate, in every part of their  
 “ management up to this date; and we oblige ourselves  
 “ and those for whom we act respectively to warrant  
 “ this discharge at all hands and against all mortals, as  
 “ law will.”

Immediately after the sequestration the estate was involved in a variety of disputes with Mr. John M'Taggart of London, who made a claim of ranking to a large amount, and also a preference over the heritable property, in consequence of certain deeds executed by the bankrupt in Mr. M'Taggart's favour. These claims gave rise to law suits, which depended in the Court of Session for several years. A dividend was appropriated to this claim, but being disputed it was set aside to await the result of the litigation. Some occasional meetings were held in relation to this matter between 1816 and 1820, but there being very little other business to attend to, many of the requisites of the statute as to accounts, &c. were not accurately attended to. It was alleged by the respondent that the remissness on the part of the creditors and their commissioners in controlling the trustee led him into the course of proceeding which ultimately gave rise to the present question.

The trustee having recovered certain debts and effects belonging to the estate presented to the commissioners, on the 16th of May 1820, a report of his management and intromissions, and also of the state of the whole funds intromitted with by him, from which he stated another small dividend might now be paid. The com-

missioners audited his accounts, and a doquet was signed by two of them in these terms:—" Met the  
 " commissioners on the sequestrated estate of the  
 " Gorbals Spinning Company, who, having examined  
 " the trustee's report and account of intromissions with  
 " the bankrupt estate, engrossed in the ten preceding  
 " pages of this book, find the same correct; and that,  
 " with the proceeds of the household furniture belonging  
 " to Alexander M'Kerlie, the funds on hand will yield  
 " a dividend of sixpence per pound, which they hereby  
 " appoint to be paid on the 5th of July next. They  
 " also fix the trustee's commission at        per cent. on  
 " his whole intromissions; and, as the whole tangible  
 " funds are hereby disposed of, it is understood that the  
 " creditors shall refund to the trustee whatever sums  
 " may be required for carrying on the process now in  
 " court, if the funds hereafter to be recovered from the  
 " bankrupt estate shall be found insufficient for that  
 " purpose."

M'TAGGART  
 and others  
 v.  
 WATSON.

16th Apr. 1835.

It was alleged by the respondent that the statement in this minute, that the trustee's accounts were correct and the whole tangible funds were thereby disposed of, was false and erroneous, at least if the claim in question was founded in fact. That on the slightest examination of the accounts it would have appeared that the trustee was keeping back and applying to his own use sums of money to a considerable amount. That, in particular, he had substracted a sum of 130*l.* out of the divisible fund, by changing the balance carried forward from 3,614*l.* to 3,484*l.*, as well as a sum of interest consisting of 33*l.* 12*s.* 8*d.*, said to have been obtained from the Royal Bank on the 13th of August 1818; and he had farther to account for the proportion of 169*l.* 8*s.* of

M'TAGGART  
and others

vs.  
WATSON.

—  
16th Apr. 1835.

interest drawn by the Glasgow Bank on the 1st of June 1820. That no investigation as to the drafts upon the bank account was made by the commissioners, nor was the interest on the dividend set aside to meet Mr. M'Taggart's claim taken into account in any of the subsequent auditings. That from the trustee's report it appeared that, besides two sums of 369*l.* 18*s.* 3*d.* and 62*l.* realised by him since the former dividend, he was also possessed of the disputed dividend, and of 1,945*l.* 12*s.* 3*d.*, the balance of sums received by him on account of the prices of the heritable property which had been sold, amounting in all to 3,514*l.* 18*s.* 5*d.*, exclusive of large sums of interest; and that no account of these sums was asked or given, nor was any evidence shown of their being lodged in bank. These statements were not admitted to be correct; and no proof was taken, other than the recovery of documents by a diligence.

On this small dividend being paid, little or nothing was done during the subsequent six years, farther than carrying on the management of the proceedings against Mr. M'Taggart.

On the 17th of May 1826 the trustee made a report to the commissioners on the state of the processes, and at the same time he laid before them a statement of his whole accounts made up to that date, taking up the fund from the statement submitted to them on the 16th of May 1820. On this statement a balance appeared in favour of the trustee of 67*l.* 11*s.* 11*d.* The commissioners signed a doquet in these terms:—" The trustee  
" produced a report as to the state of the reduction  
" with Mr. John M'Taggart; also a statement of his  
" intromissions with the estate. The commissioners



“ having examined the state of the trustee’s intromis-  
 “ sions with the vouchers thereof find upon the face  
 “ of the account a balance of 67*l.* 11*s.* 11*d.*, which they  
 “ direct him to carry to the credit of his new account  
 “ with the estate; and find the sum charged by the  
 “ trustee for remuneration to be reasonable. The com-  
 “ missioners approve of the trustee’s report, and direct  
 “ it to be engrossed in the sederunt book, and also of  
 “ the steps taken in regard to the interest of the cre-  
 “ ditors in the Gorbals property, and hope that that  
 “ long litigated case will speedily be brought to a con-  
 “ clusion. The trustee also laid before the meeting the  
 “ Glasgow Bank receipt for 3,400*l.* being the money  
 “ now in bank belonging to the estate; and they approve  
 “ of its transmission from the Royal to the Glasgow  
 “ Bank, which was done with their knowledge and ap-  
 “ probation at the time the transference was made.”

M'TAGGART  
 and others

v  
 WATSON.

16th Apr. 1835.

The appellants stated, that at this date (17th of May 1826) there was no defalcation or deficiency in the funds of the estate in the hands of the trustee, but the whole of the funds recovered stood lodged in bank; and of this fact the commissioners satisfied themselves. That there had been recovered from the heritable property 2,235*l.* 7*s.* 6*d.*, and from the general estate 686*l.* 8*s.* 8*d.*, besides the sums of bank interest of 33*l.* 12*s.* 8*d.*, 169*l.* 8*s.*, and 248*l.* 14*s.* 10*d.*, making the whole funds of the estate chargeable against the trustee 3,363*l.* 11*s.* 8*d.* That there was in his deposit account in the Glasgow Bank the sum of 3,400*l.*, and the deposit receipt of the bank for this sum was shown to the commissioners. On the other hand the respondent stated, that the commissioners had audited the accounts in a manner directly in violation of the duty imposed on them by the

M'TAGGART  
and others

v.  
WATSON.

—  
16th Apr. 1835.

statute. That a proper examination of them and a comparison with the previous accounts would have shown that the trustee was then keeping back a sum of 62*l.*, a fact apparent from the face of the accounts; for in this trustee's report of the 16th of May 1820 he noticed this sum as received by him and as omitted in the account, but the commissioners did not then or afterwards take care to include it in the divisible fund, for which the trustee was to account. That, farther, the commissioners audited the accounts without any reference to the accounts with the bank or the sums of interest accruing on the money deposited. That accordingly the accounts bear that interest was not then taken into view; and the last item (after credit being given to the trustee for 200*l.* of commission) is—"Balance in  
" favour of the trustee, 66*l.* 1*l*s. 11*d.*; interest to be  
" calculated afterwards:" and this was done; although it was obvious that if interest had been calculated the balance would have been against the trustee to a large amount. That no bank accounts were exhibited or examined or called for, and none have ever been produced. That the account approved of was confused, inconsistent, and unsatisfactory; and any person of ordinary penetration or diligence would have seen from the bank receipt alone and the trustee's statement, that funds to the extent of several hundred pounds were not in bank, and must consequently have been otherwise disposed of by the trustee.

In 1827 one of the commissioners resigned and another was called in his place, and in 1829 the other one having also retired, a meeting of creditors was held on the 12th of January, when two others were chosen, and the trustee was directed to exhibit a state of the funds

then in his possession or in progress of being recovered, distinguishing the funds drawn from the personal estate and those from the sale of the heritable property, and also from dividends unclaimed or unpaid; and the new commissioners were instructed, in terms of the act of parliament, to audit these statements and to see that the funds were deposited in bank agreeably to the statute.

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

It was stated by the appellants that the new commissioners applied to and repeatedly urged the trustee to make up the state of accounts thus ordered, and as to the amount of money deposited in bank; and after great delay a report of the state of the funds was produced to the commissioners in the beginning of May 1829. The funds of the estate had, by direction of the former commissioners, been lodged in the Glasgow Bank, which was not a chartered one; but on the 18th of May the new commissioners required the trustee to lodge the whole funds in the Royal Bank. The amount in the Glasgow Bank was 2,425*l.*, and there was in the British Linen Company's Bank 700*l.*, making in all 3,125*l.* On or about the 25th of May the trustee transferred the money lying in the Glasgow Bank to the Royal Bank, and he intimated this to one of the commissioners on the 27th of May, by a letter from Edinburgh, in which he also stated, "On my return on Friday or Saturday I will get the whole completed, when I will show you the deposit receipts," meaning that he would also transfer the funds from the British Linen Company's Bank, so as to make up the sum in the Royal Bank to 3,125*l.*

In apparent consistency with this promise the trustee exhibited to the same commissioner a bank deposit

M'TAGGART  
and others

v.

WATSON.

16th Apr. 1835.

receipt of the Royal Bank, dated the 25th of May 1829, for 2,425*l.*; and afterwards, in answer to a letter from that commissioner dated the 23d of June, inquiring whether the remainder of the funds had been lodged in the Royal Bank, he exhibited an additional deposit receipt of the Royal Bank for 700*l.*, dated the 9th of June 1829.

In point of fact, although pretending to deposit the sum of 700*l.* in the Royal Bank, additionally to the sum of 2,425*l.* already there, he did not in reality do so. He had merely drawn out from the Royal Bank on the 8th of June a sum of 700*l.*, which he relodged on the following day, and exhibited the deposit receipt then granted as if it had been a new deposit, while in reality it was only part of the 2,425*l.* drawn and relodged. Instead of transferring the sum of 700*l.* which was lying in the British Linen Company's Bank, as he had been instructed, to the Royal Bank, he drew that sum, and applied it to his own individual purposes. He soon thereafter became bankrupt and resigned his office, when Mr. Kerr was elected in his place. It was then discovered that he had embezzled the following sums:—1st, the above sum of 700*l.* on the 2d of May 1829, lying in the British Linen Company's Bank, together with 5*l.* 8*s.* 5*d.* of interest thereon; 2dly, after making the deposit of 2,425*l.* in the Royal Bank on the 25th of May 1829, he drew out secretly various sums, amounting to 195*l.*, of which he only applied 25*l.* to the purposes of the estate, appropriating the remaining 170*l.* to his own purposes; 3dly, he also drew a variety of other smaller sums in a clandestine manner, which he appropriated similarly; the whole of these being so drawn after the last doquet by the commissioners on his ac-

counts certifying them to be *ex facie* correct. The total deficiency amounted to 1,008*l.* 12*s.* 2*d.* For payment of this sum Mr. Kerr brought an action against the respondent founding on the bond of caution. Mr. M'Taggart and others were thereafter admitted as pursuers, in the character of assignees of Mr. Kerr, the trustee. In defence, the respondent pleaded that he was liberated by the conduct of the commissioners in not observing the rules of the statute and exercising a direct control over the conduct of the trustee.

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

The Lord Ordinary pronounced this interlocutor (12th Nov. 1833):—"Sustains the defences, assoilzies the  
"defender, and decerns; finds him entitled to his ex-  
"penses, of which appoints an account to be given in;  
"and the Lord Ordinary thinks, that in various respects,  
"but, in particular, in respect to the money falling to  
"be in bank, there was a gross failure by the commis-  
"sioners to observe the regulations of the statute pro-  
"vided to control the trustee; and the Lord Ordinary  
"further thinks, that, in all probability, this neglect of  
"duty was the cause of the embezzlement which pro-  
"duced the loss. The trustee Jeffrey did not snatch  
"the money and run off; even at the end he seems  
"to have taken the use of it in the hope of replacing it  
"before it was missed; a hope encouraged in him by  
"the want of any examination of his accounts with the  
"banks, and indeed of keeping or exhibiting any ac-  
"counts with the banks at all."

A reclaiming note was presented by the appellants to the Lords of the Second Division, who referred it on the 24th of January 1834.<sup>1</sup>

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<sup>1</sup> Shaw and Dunlop, B. P.

**M'TAGGART  
and others**

**v.**

**WATSON.**

—  
16th Apr. 1835.

**M'Taggart and others appealed.**

*Appellants.*—1. The court below altogether overlooked or did not give sufficient weight to the fact, that the respondent was himself surety that those very things should have been done which he complains were not done, and was not therefore entitled to complain of their omission or neglect.

This plea involves a principle most material to be borne in mind in estimating the liabilities of a surety situated like the respondent, but which has been very much thrown out of view by the court below, not only in deciding the present action, but also in some of the other cases founded on as precedents. These decisions, in themselves not very consistent, were not submitted to the review of this house, and therefore the whole principles applicable to the case of a cautioner in a bond like that in question are open for discussion.

The bond in express terms contains two several obligations. The first is, “ that the said William Jeffrey  
“ shall and will manage the said estate in all respects  
“ conform to the statute under which the sequestration  
“ was awarded.” The second obligation, which is distinct from and additional to the first, is, “ and that I  
“ shall and will hold just count and reckoning, and  
“ make payment, &c., for my whole management, receipts,  
“ and intromissions, as trustee foresaid.” Besides the obligation to make payment of any pecuniary balance which Jeffrey might be owing to the estate, there is here a most distinct and unequivocal obligation on the respondent, binding him to guarantee that Jeffrey should do all those things in discharge of his office which the statute requires to be done.

The necessary inference is, that both these obligations being in the bond, both are to be enforced against the obligant. Yet what the appellant has to complain of in the court below is, that they altogether failed to enforce, and apparently refused even to recognise as valid, one of these obligations, viz., that by which the respondent became bound that the trustee should perform all the statutory duties ; for the result to which the court came was, that the obligation to see that the trustee discharged these duties lay entirely with the creditors and commissioners, and not with the respondent at all. Their judgment proceeds on the assumption, that the respondent was so completely free from any obligation to see the statutory duties rightly performed, and that this obligation lay so exclusively on the other side, that they held the supposed omission on the part of the creditors and commissioners to perform this obligation sufficient to discharge the respondent. They completely reversed the obligation in the bond, making that which is an obligation against the respondent operate as an obligation on the other side in his favour ; or, at all events, they entirely struck out and rendered a mere dead letter the express obligation on the respondent to warrant the trustee's discharge of the statutory duties, and confined the respondent's liability to the mere payment of the pecuniary balance owing by the trustee ; and this too, only provided the creditors and commissioners had made good to him a rigid exaction from the trustee of the whole statutory requisites.

But this is a mode of interpretation of the bond which is not admissible.

In electing a trustee the creditors are of course

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1895.

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

desirous to have security that he should do his duty, and that the estate should not suffer loss from his negligence or culpability. They are enabled under the statute to attain this end in two different ways, perfectly compatible with each other, and indeed plainly intended by the statute itself to form concurrent checks. The one of these is the appointment of the statutory commissioners under authority of the 34th section of the statute, which empowers them to “ name any three of the creditors as “ commissioners, for the purpose of auditing the trustee’s “ accounts, settling his commission, concurring with “ him in submissions and compromises, and giving their “ advice and assistance to him in any other matters “ relative to the management of the bankrupt estate, “ subject always to the control of general meetings;” coupled with the provision of sec. 35, “ that it shall “ and may be lawful for such commissioners to meet at “ any time they think fit for the purpose of ascertaining “ the situation of the bankrupt estate, and of examining “ the acts and transactions of the trustee, and to make “ such reports as they, or any one of them, may think “ proper to make from time to time to a general meet- “ ing of the creditors.” But, over and above the check afforded by the appointment of these officers, the statute also sanctions another and an additional security,—the personal obligation of a surety, binding himself that the trustee “ shall and will manage the said estate in all re- “ spects conform to the statute.” The security gained by this obligation can never, with the least propriety, be held to be superseded by the appointment of commissioners; on the contrary, it is a security additional to that derived from the control of these officers, and



which cannot be held affected by the manner in which they may have discharged their duty. If that duty is rightly performed, the creditors have both the statutory checks in full operation. If one of these checks fail them, by a negligence on the part of the commissioners, this affords no sort of reason why the other should become entirely inoperative. On the contrary, the less faithfully the duty of the commissioners is performed, the more necessity there is for the enforcement of the obligation on the cautioner; inasmuch as upon that obligation the safety of the creditors just so much the more depends. It is utterly to mistake the whole intentment of the statute, to assume that the diligence of the commissioners is to be the measure of the cautioner's liability, and that their negligence must form his liberation. The intention of the statute, on the contrary, is to give the creditors something more than the mere contingent diligence of the commissioners; it is to give them the personal security of one whose pecuniary interest is involved in the discharge of his obligation, to which security the creditors may have certain recourse, in whatever way the commissioners may discharge their duty.

The force of these considerations will appear the stronger, if there be considered the extreme inexpediency, and, indeed, almost absolute necessity, of securing the estate by an obligation of this description, altogether independent of the check afforded, either by the watchfulness of the creditors themselves or of the official commissioners. In having a cautioner bound in all circumstances for the right management of the trustee, there is just that responsibility devolved on a single individual, which is more available than any responsibility can ever

**M<sup>c</sup>TAGGART**  
and others  
v.  
**WATSON.**

16th Apr. 1835.

**M'TAGGART**  
and others  
v.  
**WATSON.**

16th Apr. 1835.

be which is divided; and this, too, a responsibility which, from the deep pecuniary interest the individual has at stake, is almost sure to be accompanied by a faithful discharge of the obligation. It is widely otherwise, either with the general body of creditors, or with the commissioners. It is out of the question to expect any efficient superintendence from the general mass of creditors, who are very commonly scattered far and wide over the country,—and many of whom are in no situation so attend to their interest,—occupied in their own concerns,—abroad,—lunatics,—minors. With regard again to the commissioners, they are gratuitous officers, and, therefore, to a very large extent, irresponsible; because it would require something very nearly approximating to actual fraud to subject them in pecuniary liability. The demand which the respondent makes against the commissioners on bankrupt estates is one which it is utterly impossible, with any degree of reason, to make against men acting gratuitously, and fully occupied with their own concerns; for it would imply a devotion to the business of the bankrupt estate, almost equal to that of the hired trustee himself, and, at all events, a minute and accountant-like examination into details, most unreasonable to expect from individuals so circumstanced. To say, therefore, that the cautioner is liberated by the negligence of creditors or commissioners is to maintain a proposition at variance with the whole policy of the bankrupt act, which intends, in addition to all other securities, to give the sequestrated estate the security of this individual obligation, on which the general body of creditors may always have a certain hold, whatever negligences may occur in other quarters.

It is said that the commissioners are the representa-

tives of the creditors, and that any negligence on their part implies a breach of contract with the cautioner. But the commissioners are, in no legal sense, representatives of the creditors. They are special officers, who act for their behoof in discharge of particular duties. They are, no doubt, appointed by and for behoof of the creditors, and their negligence may be, and no doubt often is, very prejudicial to the creditors, in the same way with the negligence of any other persons in the creditors employment. But it is an altogether different thing, and quite unwarranted by any legal principle, to maintain that their negligence is not only to have this effect in itself, but also to have that of depriving the creditors of the benefit of a collateral security, expressly intended by the statute to supply the defects created by a want of diligence in these very commissioners. But even supposing that the commissioners could be regarded as in some sense the representatives of the creditors, it is altogether a mistake to regard any negligence on their part as being in the light of a breach of contract with the cautioner, for this plain reason, that any diligence in the matter was, by the contract, not laid on the creditors and commissioners, but on the cautioner himself. There is no diligence stipulated for in the contract to be used by the commissioners or creditors. The diligence is all engaged for on the side of the cautioner, who becomes bound unlimitedly that the trustee “ shall “ and will manage the said estate in all respects conform to the statute.” He stipulates for nothing whatever from the other side, and cannot therefore, complain that nothing was given. No breach of contract can be alleged; for no contract takes place. He pledges

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

**M'TAGGART**  
and others

v.

**WATSON.**

—  
16th Apr. 1835.

his liability unqualifiedly, and in all circumstances. And in doing so, he only follows out the design of the statute, which was to give an additional security, in this unlimited personal obligation, over and above all the other statutory checks.

But the judgment of the court below puts the case in the same position, as if on the one hand there had been no obligation at all by the cautioner for the trustee's faithful fulfilment of the statutory requisites, and on the other side, as if there were an express obligation on the creditors to warrant this to the cautioner. If this had been truly the case, the argument of the respondent might apply. But there is no obligation on the subject in favour of the cautioner, on the contrary, there is an express obligation laid on him.

Had the contract been silent and laid no obligation either on the one party or the other, there would have been more plausibility in the respondent's argument. In such a case, there might have been some room for the plea, which is the whole prop of his defence, that the cautioner was entitled, as by a sort of implied contract, to expect on the side of the creditors and commissioners an exaction of all the ordinary statutory duties from the trustee. But the state of things is entirely altered by the fact of an express clause occurring in the contract, by which the cautioner takes on himself the obligation that the trustee "shall and will manage the estate in "all respects conform to the statute."

This therefore is not the case which the respondent has set forward in the Court below, and which the court has evidently assumed it to be in their judgment, viz., a case where the contract being altogether silent, the cau-

tioner was entitled to rely on an enforcement of the statutory requisites from the trustee on the part of the creditors and commissioners.

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

The distinction betwixt the case where the contract either lays the obligation expressly on the creditor, or is silent, and the case where the enforcement of the duty is laid on the cautioner himself, is one which is quite familiar to the law of Scotland in regard to the contract of suretyship. It was recognized in the cases of *Hamilton v. Calder*, *Wallace v. Lauders*, *British Linen Company v. Nisbett*, and *Eadie v. How*.<sup>1</sup>

The decision in the case of *Wallace* contains within itself an explanation of a case sometimes quoted on the other side, viz., *Dick v. Nisbett*.<sup>2</sup> In that case there were two discriminating circumstances. 1st, the obligation was expressly laid on the creditor in favour of the cautioner; for the report bears, "there was a clause " that Nisbett should make up his accounts quarterly " with Sir James, his master, to be exhibited to the " cautioner. 2d, the cautioner required Sir James to " do so, and protested to be free for his not counting."

Therefore, without admitting the negligence and omissions alleged by the respondent, but assuming the whole of his statements to be correct, they are met by the general answer, that the terms of his own obligation exclude his founding on these any plea of liberation. If he says that the trustee omitted to render regular accounts, and was not compelled to do so, the appellant's

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<sup>1</sup> *Hamilton v. Calder*, 18th June 1706 (Mor. 2091); *Wallace v. Lauders*, 20th Feb. 1707 (Mor. 2096); *British Linen Company v. Nisbett*, 17th June 1773 (5 Brown's Sup. p. 409); *Eadie v. How*, 3 Feb. 1829 (7 S. & D. p. 856).

<sup>2</sup> *Dick v. Nisbett*, 30th Nov. 1697 (Mor. 2070).

**M'TAGGART**  
and others

v.

**WATSON.**

16th Apr. 1835.

answer is, that the respondent himself became bound to see these given; and it is his own fault that they were not rendered. If it is said that the money was not rightly deposited in bank, and suffered to lie there, on account of the estate, in due and regular form, the appellants answer, that the respondent was himself bound to see done the very thing which he complains was not done. If it is said that the commissioners might have known, and ought to have known, the precise state and condition of the trustee's transactions, it is replied, that the same means of information were open to the respondent; and if it is added that the creditors and commissioners were bound not only to have been aware of, but to have informed the respondent of the improper proceedings of the trustee, so as to enable him to put a period to his cautionary obligation, the answer is, that the respondent was bound himself to know these proceedings; and if he desired to get free, to intimate these to the creditors, and protest for his liberation, and not doing so, must be held to have acquiesced in the trustee's proceedings, or, at least, is not entitled to complain of these being allowed to go on.

2. But even if there were any foundation for the argument in defence generally, it would be altogether irrelevant and inapplicable, in so far as regards the sum of 700*l.*, feloniously abstracted from the bank by the trustee, for reimbursement of which to the estate the respondent must, in any view, be held liable.

It is important to attend to the very particular way in which, to a considerable extent, the trustee became debtor to this estate. This may materially affect the question of his cautioner's liability, even on the principles of the respondent himself; because, giving every

weight to the plea of negligence, it is quite obvious that there may be a great many improper proceedings on the part of the trustee, which no diligence whatever could prevent, and to which, therefore, this plea of negligence is quite inapplicable.

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

Now, the facts as to the sum of 700*l.* are there taken possession of by the trustee in the month of May 1829, the funds of the estate, amounting to 3,125*l.*, were lying fully deposited in bank,—2,425*l.* in the Glasgow Bank, and 700*l.* in the bank of the British Linen Company. Mr. Jeffrey was required to transfer the whole sum into one account, to be kept, according to the statute, with the Royal Bank of Scotland. He did transfer the sum of 2,425*l.* from the Glasgow to the Royal Bank accordingly. But in place of doing the same thing with the sum of 700*l.* in the bank of the British Linen Company, he took this money, and appropriated it to his own purposes, whilst, at the same time, to conceal the depredation, he played off the ingenious manœuvre of drawing from the Royal Bank, and relodging, the next day, 700*l.* of the money there deposited, so as to get a separate deposit receipt for this sum of 700*l.*, to be exhibited to the commissioners as if it were the proceeds of the money in the British Linen Company Bank regularly transferred. In this way, by exhibiting two deposit-receipts of the Royal Bank—the one for 2,425*l.* the other for 700*l.*—without, of course, disclosing any thing of the intermediate draft of 700*l.*, which enabled him, by immediately relodging the money, to get the second voucher,—the commissioners were deceived into the belief that the whole 3,125*l.* was safely deposited in that bank, whilst, in truth, only 2,425*l.* was so, and the 700*l.* which had been in the bank of the British

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

Linen Company had been abstracted and appropriated by Jeffrey himself.

This was not only an act of culpability, but an act of gross and criminal swindling. It was not merely the accumulation of a balance allowed to remain in the trustee's hands through negligence. It was a direct theft or depredation. It had in it the essence of a crime.

Even were the principles on which the respondent founds his argument indisputable, they are altogether inapplicable to a case like this. There was an act committed by the trustee, which no precaution could prevent, and no ingenuity anticipate. No man could possibly suspect, that Mr. Jeffrey was about to act the part of little better than a common thief. No one could have prevented the theft from being perpetrated. There might be negligence in discovering the depredation, or, in afterwards applying a remedy; but no conceivable diligence could have operated as an obstacle against the trustee's stealing this money, any more than against his stealing any goods from the bankrupt's warehouse, which equally lay open to his depredations.

But farther, at the time this depredation was committed, the commissioners and creditors, so far from showing any negligence, were engaged in the most diligent and active administration of the estate. And it cannot be pretended that any undue delay occurred in the discovery of the depredation, nor that after the occurrence of the depredation, there was a single thing done on the part of the creditors or commissioners, tending, either directly or indirectly, to sanction or cover the proceedings of the trustee, or to mislead the cautioner in regard to them. There was, as just stated,



no audit, and of course therefore no docquet certifying or approving of his accounts. There was no commission awarded on him, nor any discharge ratifying or approving of his proceedings; and the moment it was discovered, the cautioner was made fully cognizant of it, and steps taken to effect the removal of Jeffrey from his office, which was completed before the month of November of the same year.

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

The only way in which the respondent attempts to maintain his plea is by founding upon misconduct on the trustee's part long prior to the date of this abstraction; and to contend that these involved so much impropriety as to have called upon the creditors and commissioners to remove him from his office; by which means, it is said, the subsequent speculation might have been prevented. It is alleged that the trustee was in the habit of making an improper use of the money of the estate, by drawing it out when the estate did not require it,—and it must have been used for his private purposes; he only taking care again to deposit the money before each audit, so as to present at each of those periods the appearance of the whole funds of the estate being safely in bank. It is pleaded that this was a breach of duty on the trustee's part, which ought to have led to his removal by the creditors, long previously to the date in question.

But these allegations are not admitted.

The respondent does not aver that the creditors and commissioners knew of its existence. All that is said is, that they ought to have known. But to this proposition, the appellants demur.

More particularly they maintain that the respondent himself, as the trustee's cautioner, was at least

**M'TAGGART  
and others**

**v.**

**WATSON.**

16th Apr. 1835.

equally bound to know the whole of these prior proceedings by the trustee, and either did, in point of fact, know and acquiesce, or must be held in law to have known and acquiesced in them. It is entirely untenable to plead with effect that the creditors and commissioners ought to have been acquainted with the whole prior proceedings of the trustee, and that the trustee's cautioner must be held all the while justifiably ignorant of them. His own obligation necessarily implied a continual watchfulness on his part in regard to the trustee's proceedings; as, without such watchfulness, it was, of course, impossible to fulfil the obligation. It was the duty of the respondent, not merely to know the character of the trustee's transactions, but, if he conceived that this was such as to make his obligation a hazardous one, to intimate this to the creditors, and call on them to interfere to check the proceedings, on pain of losing the benefit of his bond of caution. Not doing this, he must be held barred from maintaining the plea that the conduct of the trustee was such as to render it dangerous that he should continue in office, or as entirely altered or increased the risk which he consented to run; because the continuance in office of the trustee must be held to have been with the perfect acquiescence of the respondent himself, knowing, or held in law to have known, the whole character of these proceedings.

*Respondent.*—The principles applicable to a cautionary obligation of the description of the one in question are not different from those which obtain in other contracts of this class. But in considering the situation of cautioners generally a very important distinction requires to be attended to; in some cases, where a cautioner becomes bound, the creditor is not called upon

to take any active steps against the principal debtor; and he is entitled to remain passive and quiet, and to take his own time for enforcing payment against the cautioner, on the failure of the principal. Thus, in the ordinary case of a cautioner for a debt or an account, the creditor is not bound to use any diligence, or to make any exertions to recover payment from the principal obligant; in such cases of cautionary mere omission will not liberate the cautioner, though an express arrangement for giving the principal debtor time, or a material change in the manner of dealing with him, will set the cautioner free.

**M'TAGGART  
and others  
v.  
WATSON.**

16th Apr. 1835.

But there is another class of cautionary obligations, when the creditor, obtaining the benefit of the caution, does become bound to do certain things on his part for the benefit of himself and the cautioner; and when that is the case, the creditor, by omitting to perform his part of the contract, will liberate the cautioner from his counter obligation. Thus, where a person becomes cautioner for rent, the landlord is not bound to exercise his hypothec in order to recover payment, as was found in the case of *M'Queen v. Fraser*.<sup>1</sup> But, on the other hand, if the landlord engages to use his hypothec for the relief of the cautioner, then, by his omission to do so, the cautioner will be discharged. The case of *Mactavish v. Scott*<sup>2</sup>, as reversed in this House, is an express authority on this point; and a direct and important analogy on this subject may be obtained from the English case of *Montague v. Tedcomb*.<sup>3</sup>

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<sup>1</sup> *M'Queen v. Fraser*, 11th June 1811, F. C.

<sup>2</sup> *Mactavish v. Scott*, 7th Dec. 1830, 4 W. & S. 410.

<sup>3</sup> *Montague v. Tedcomb*; 2 Vernon, 518; *Fell on Guarantee*, 2d Edition, p. 180.

**M'TAGGART**  
and others  
v.  
**WATSON.**  
—  
16th Apr. 1835.

The question, therefore, whether mere omission will liberate a cautioner, depends entirely on the previous question, whether the contract entered into belongs to one or other of the classes just mentioned; whether, at entering into the contract, any thing was or was not stipulated to be done on the part of the creditor for the protection of the cautioner. In the one case, mere negligence and omission may be of little importance; in the other, if it be in a material point, it must be destructive of the creditor's claim.

But the cautionary obligation which the respondent entered into plainly belongs to that class in which certain counter engagements are undertaken by the creditors, the neglect and violation of which will have an important effect on the cautioner's situation. The contract is strongly assimilated to the case where a cautioner for a servant obtains a stipulation, that there should be a periodical settlement of accounts with the employer. Here, it is true, nothing on this subject is expressly contained in the bond of caution; but that bond is not the whole or the only contract between the parties on either side. The caution is required by the sequestration statute; the office for which it is interposed is the creature of that statute, and the bond is granted under the statute, and has an express reference to the statutory provisions. The case is, indeed, the same as if the statute had been narrated at full length in the obligation; and its enactments are as much the law, and the contract of parties, as if they had been made matter of express stipulation. They regulate the duties of the trustee, and the obligations of the cautioner on the one hand; and, in like manner, on the other, they fix the privileges of the cautioner, and the office and duties of the creditors and their representatives.

The present question, therefore, is to be considered on the footing of the respondent having become cautioner for the due discharge of the office of trustee, under a contract and understanding that the constituents of the trustee should, on their part, observe the requirements of the statute, and, above all, that they should attend to those safeguards which have been provided for securing the fidelity and integrity of the trustee's management in his intromissions with the funds of the estate.

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

It is true that the proposition now maintained must be taken under qualification, and with reference to ordinary notions of sound discretion. The statute has laid down a number of provisions for the guidance of the trustee, which it is almost impossible, and which it would not be very expedient, always to observe in a literal and judicial manner; and certainly the respondent does not argue that a trustee's cautioner would be liberated in consequence of every slight or trivial deviation from the letter of the statute, even though sanctioned by the commissioners, or actually committed by themselves. Such strictness is not to be enforced, just because it would be practically inconsistent with those very principles on which a strictness is required to be observed on more material points. This question, like the others, is to be regulated with reference to what should be held to be the contract of parties. As matters are managed in actual business, it cannot be supposed that the cautioner for a trustee counts upon the observance of every minute regulation, or anticipates that inconsiderable deviations from the statute are to dissolve his obligation. But, on the other hand, legally and practically speaking, it is impossible not to conceive that he does calculate on a compliance with the main provisions of the statute,

**M'TAGGART**  
and others  
v.  
**WATSON.**  
—  
16th Apr. 1835.

and expects that, if the creditors and commissioners permanently and totally neglect the course of duty imposed by the statute on them, for the common safety of both parties, they are not to be allowed to make a claim on him for the consequences of their own misconduct.

Now, of the various duties imposed upon the commissioners, none is more anxiously pointed out in the statute, and none is of more importance in its operation, than that of checking periodically and strictly the state of the trustee's intromissions and bank operations. This duty is imposed on them by the statute, in words as positive and express as occur in any of its enactments, and it is manifest that the existence of this obligation on the part of the commissioners, must be one of the most material elements to which a cautioner looks, in undertaking this hazardous obligation. There would be the widest difference between entering into a contract in which the constituents took upon themselves the duty at certain intervals of examining and comparing the trustee's bank accounts, and seeing that he never improperly retained or used the trust funds, and entering into a contract where the constituents declined any such task, and made no provision for exercising any control over the trustee's proceedings in this respect. Many persons would enter into the one compact as cautioners, who would think it imprudence or madness to engage in the other.

It is obvious again, that where this duty is undertaken, and forms a part of the mutual contract, the failure to discharge it properly and conscientiously must make an entire change on the situation of parties. Nothing can be more dangerous to the integrity of a trustee than to

allow him, without check or control, to intromit for years with hundreds and thousands of pounds belonging to a sequestrated estate, and thereby tempt him to engage in expenses and speculations calculated to end in bankruptcy and ruin. The respondent will not say that every slight irregularity on the part of the commissioners, even in this matter, will liberate the cautioner,—though, for instance, the auditing of the accounts should not always take place precisely at the statutory interval, or though the trustee should appear in the accounts to have occasionally kept a few pounds longer in his hands than he should have done. These circumstances might not be enough to deprive the creditors of their ultimate claim. But where, during the whole progress of the sequestration, the statutory check is never once put in force or never sufficiently put in force; where years are allowed to elapse between one auditing and another; where, in the meantime, the trustee appears, on a comparison of his account of intromissions with the bank account, to be drawing out large sums belonging to the estate, which ought to be kept sacred, and which are not required for the purposes of the sequestration; where the trustee is permitted for years to take the use of 2,000*l.* or 3,000*l.* of the deposited money, and merely puts it again into the bank account on the eve of the next settlement; where, after all these palpable and open irregularities, the trustee's accounts are audited and passed, and the approbation of the commissioners given to his conduct by the unequivocal mark of awarding him a large commission, it is surely impossible to say, that such a gross violation of the most vital provisions of the statute can be suffered to take place, without liberating the cautioner, whose condition would otherwise be so

M'TAGGART  
(and others  
v.  
WATSON.

16th Apr. 1835.

**McTAGGART**  
and others  
v.  
**WATSON.**  
—  
16th Apr. 1835.

entirely changed for the worse by such a mode of proceeding. Above all, if this course of conduct is allowed to continue for a period of fourteen years, so long beyond the natural life of a sequestration, during which not a whisper of complaint is heard against the trustee, nor any communication held with the cautioner, it would be the height of injustice, were he to be subjected, after so long a perseverance in a line of conduct so injurious to his interests. Accordingly these principles were sanctioned and given effect to by both divisions of the court in the cases of *Duncan v. Porterfield*<sup>1</sup>, where it was held, that “ cautioners for the trustee on a bankrupt estate  
“ were relieved by the gross negligence of the commis-  
“ sioners and creditors in superintending and controlling  
“ the conduct of the trustee;” of *Mein v. Hardie*<sup>2</sup>, where the cautioner was found to be liberated by the misconduct of the commissioners, which consisted in the very matter now complained of—their neglect to see that the money of the estate was deposited in bank ; and *Dalziel v. Menzies*.<sup>3</sup> In this case, “ where commis-  
“ sioners of supply, on electing a collector of cess,  
“ minuted a resolution that he should produce a dis-  
“ charge from the receiver-general annually, and cau-  
“ tioners bound themselves for his intromissions for that  
“ year and each year of his re-election ; and the  
“ collector was re-elected thrice without being required  
“ to produce the receiver general’s discharge, and in-  
“ curred arrears before the first re-election, and also  
“ afterwards ; and no notice was given to the cautioners  
“ till nearly a twelvemonth after his resignation : Held

<sup>1</sup> *Duncan v. Porterfield*, 13th Dec. 1826, 5 S. & D.

<sup>2</sup> *Mein v. Hardie*, 19th Jan. 1830, 8 S., D., & B. 346.

<sup>3</sup> *Dalziel v. Menzies*, 15th Feb. 1831, 9 S., D., & B. 434.



“ that they were liberated, although special reference  
 “ was not made to the minute in their bond.”

M'TAGGART  
 and others  
 v.  
 WATSON.

16th Apr. 1835.

Now, what are the facts in the present case? Under the express terms of the 43d section of the statute, it is competent to the commissioners at all times to examine the trustee's bank transactions, and they are expressly required to do so at certain periods fixed by the statute. The way also in which they are to check the trustee's bank transactions is specially pointed out. The trustee is to keep an account in a bank, and the commissioners are to compare the sums lodged by him from time to time with the sums received by him, and to examine the sums drawn by him from such bank, and disbursed by him on account of the bankrupt estate. An examination of this kind must infallibly discover any irregularities on the part of the trustee; and the habitual use of it would deter the trustee from attempting to withdraw a single shilling of the funds from its proper purpose, while, on the other hand, the negligent and defective observance of this precaution, or the total omission of it, must afford the strongest encouragement to the trustee to tamper with the trust money, and apply it to his own ends from time to time. But although the sequestration was awarded in 1815, and Jeffrey, the trustee, continued in office until he was allowed to resign in 1829, a period of fourteen years; yet, during all this time, the documents that are in process prove, beyond a doubt, either that the commissioners never audited the trustee's accounts at all, in terms of the statute, though they occasionally attested that they had done so, or else that, when they did audit them, they countenanced and connived at a system of gross misconduct and misapplication of the funds on the part of the trustee by the

**M'TAGGART**  
and others  
v.  
**WATSON.**

16th Apr. 1835.

ultimate operation of which the estate was deprived of the large sum now said to be due by the trustee. The contract therefore with the respondent has been violated both in spirit and substance, and he is consequently discharged. The distinction attempted to be taken as to the 700*l.* is not maintainable. The commissioners by their late conduct gave free scope to the frauds of Jeffrey, and neither they nor those whom they acted for can be entitled to insist for payment from the respondent of money embezzled, if not with their connivance, at least by their gross and culpable negligence.

**LORD BROUGHAM.**—My Lords, the case of Watson, one of the defendants in the Court below, is now alone before your Lordships. He had become surety for William Jeffrey, the trustee on the sequestrated estate of the Gorbals Spinning Company, and had given the usual bond for Jeffrey's conduct and accounting as such trustee. By the Scotch forms of proceeding the bond is not given to any individual as obligee, but it is an obligation to the extent of 1,000*l.* by the trustee and his cautioner jointly, and in which both are principal obligors. As the condition is, that William Jeffrey shall faithfully and regularly discharge his office of trustee, and as the creditors afterwards choose three commissioners to act for them,—we may say, in a sense, to represent them in their dealings with the trustee, and in some sort to control, or at least to superintend his proceedings, we may allow it to be held that those creditors, and, it is said, the commissioners thus appointed by them, and acting on their parts, are the obligees; and that their acts, for example, in releasing the principal obligor, William Jeffrey, would discharge William Watson his

surety; that any connivance at Jeffrey's misconduct, and any act otherwise injurious to the rights and equities of the surety Watson, and done behind his back, would release him as much as if the bond had been given to them, instead of being left indefinite as to the person of the obligee. We are thus making the most favourable suppositions possible to the respondent, for we are not only assuming the creditors to be represented and bound by the commissioners, but we are allowing Watson to be a surety only, whereas he is a principal, being a joint and several obligor. William Jeffrey, by a series of irregular proceedings, and by various contrivances, amounting to fraud, in respect to the sequestrated estate, was found in arrear in his accounts to the amount of 1,000*l.*; and the appellant (the trustee who succeeded him) put the bond in suit against Watson, who defended himself by accusing the commissioners of great neglect in their superintendence of Jeffrey,—of conniving at his misconduct,—of concealing from him the several matters which they knew; and of generally failing to discharge their duties under the Bankrupt Act towards the creditors, which the respondent considers as also their duties towards him in his capacity of William Jeffrey's surety. Almost all of these charges, in point of fact, are denied by the appellants, the trustee, and the commissioners. They deny all knowledge or suspicion of Jeffrey's frauds, which were indeed for the most part so cunningly devised as to escape even a pretty close scrutiny. They deny all laches or negligence in the discharge of their own office. They only admit that their meetings were not held as often or as regularly as the act directs; and they also allow that a sum lodged in the Royal Bank by Jeffrey,

McTAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

as the act requires, was, with their privity and consent, transferred to a Glasgow bank, of which one of themselves, a large creditor of the bankrupt, was a partner, but which was perfectly solvent, and by which no loss whatever has accrued to the estate. Upon this latter fact admitted I have to observe, that it was most irregular in the commissioners to allow the transfer of the fund from one of the three banks expressly named in the statute without the consent of their constituents, the creditors, and the more to be blamed, that one of themselves, or his banking house, was to profit by the operation. Had any loss occurred by the proceeding, not only would Watson have been discharged from all liability in respect of it, but the commissioners would have been accountable for the whole amount of it to the body of the creditors at large. But no loss having occurred, and William Jeffrey having done no act of malversation, or even of neglect, up to the date of that transaction, I am clearly of opinion that Watson is not, at least by this transfer, discharged from his obligation in respect of Jeffrey, as regards his subsequent proceedings. The Court below having assoilzied the defender in respect of the neglect and irregular conduct of the commissioners, which their Lordships held to operate Watson's discharge, the present appeal is brought from that decree, and we are now to see upon what grounds it rests; and, first of all, I have to remark, that here, as in so many of the Scotch cases, we find extremely little attention paid to the facts, hardly any care being taken to ascertain what these are, by examining which of the statements on either side is admitted, and which denied, or not admitted by the other. The matter of fact is thus too often passed over as of little moment, in order

to get at the matter of law, on which all the pains both of the bar and the bench are bestowed. But on the fact every thing must depend, and it is to be noted in this case that the fact is assumed,—assumed too all one way, and against the appellants, in the face of their positive denial, and in the absence of proof. The Court take for granted that the commissioners acted with gross negligence in the performance of their duty, though this is denied; and they assume that out of their negligence arose the malversations of Jeffrey, or the opportunities for committing them,—opportunities which, but for the laches of the commissioners, he could not have had; and yet not only is this denied, but upon all the circumstances, as they appear in the case, I really do not think, even morally speaking, and to say nothing of legal evidence, that the fact is so. But another thing, if possible still more important, has been equally overlooked,—the frame of the bond itself, the whole ground of the action. The obligation is, that “William Jeffrey shall manage the estate in all respects conform to the statute, under which the sequestration was awarded,” as well as that he shall “hold just compt and reckoning, and make payment to the creditors according to their several claims.” Compt and reckoning for what? “For my whole management, receipts, and intromissions as trustee, with the whole estate.” Now, the main reliance of the respondent, and in which view the Court fully shared, is upon the supposed fact of the commissioners having been careless in calling on William Jeffrey to render accounts, and in other respects to perform his duty under the statute. They say, that it was the office of the commissioners to see that he did perform his duty; that the cautioner, Watson, relied on their per-

M'TAGGART  
and others  
v.

WATSON.

16th Apr. 1835

M'TAGGART  
and others

v.

WATSON.

16th Apr. 1835.

forming that office; and that their non-performance creates a case which he never contemplated, and to which his suretyship cannot apply. Was it of no moment to observe, that the performance of the statutory duties by Jeffrey was one of the very things for which the obligation bound his surety? Assuredly it is no argument against my being answerable for a man's doing a certain thing, that the party to whom I gave this obligation did not see that he did the thing. I had myself undertaken for his doing it, and it is no discharge of my voluntary obligation, that the other party, the obligee, did not see to his proceedings. The statute and the bond in truth have, the very object of giving the creditors a double security against malversation,—the superintendence of the commissioners and the obligation of the surety. The argument for the respondent, and which has swayed the Court below, at once cuts off one of these securities and leaves the creditors only protected by the other. The duty incumbent on the commissioners as a pledge to them continues; but that security they had without the bond; and I do not see how the bond can avail them at all, or why it was to be taken if this argument prevails. The defective state of the facts in this case to support Watson's defences renders it unnecessary for me to enter upon many of the legal questions, raised on little or no foundation, and discussed with no profit, because with no application to the case at bar. I may, however, observe, that very dangerous doctrines on suretyship obligations appear to be ventilated in some of the cases in Scotland (cases which have never been appealed to your Lordships). The language of the learned judges is calculated perhaps to convey, as reported in the books, a meaning far stronger

than their Lordships intended. They are really made to speak more of the obligee's duties than of the obligor's covenants; of the duties towards the surety, which a person indemnified and guaranteed is bound to perform, rather than of the obligation which that surety has incurred towards him. A closer watch is thus kept over the conduct of the party who has taken an indemnity than over the liability of him who has given it. Now, that the obligee may, by his conduct, release a surety in certain cases, no one can doubt. The holder of a bill, giving time to the acceptor, discharges the indorser from his suretyship liability even at law, and so in any other guarantee by simple contract: and in equity, the obligee in a specialty may do so, by giving time, or otherwise injuring the recourse of the surety or co-obligor; and all this upon the ground that the surety has a right to stand in the place of the creditor, holder, obligee, or other party indemnified, and must not have his rights or equities voluntarily cut down by the acts of that party. But while at law the surety in a bond is not at all discharged, even by a long neglect of the obligee to demand payment or account from the principal, nay, where the latter has become insolvent, during the time thus suffered to elapse, as was decided in the *Trent Navigation Company v. Hardy*<sup>1</sup>, the courts of equity have never, to my knowledge, given a discharge to the surety merely on the ground of the creditor—the obligee—not having called on the debtor so early as he ought, or not having given early notice of his failure or nonpayment to the surety. The case of *Mr. Law, Mr. Tierney's surety in Calcutta*, at the Rolls in 1799, gave rise to much discussion, and an

M'TAGGART  
and others  
v.  
WATSON.

16th Apr. 1835.

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<sup>1</sup> 10 East, R. 34.

M'TAGGART  
and others

v.

WATSON.

—  
16th Apr. 1835.

elaborate judgment by Lord Alvanley; it is reported in 4 Vesey, 824; but there were other circumstances very different from such laches to govern that judgment, and especially the payment of a balance to the representatives of the debtor by the party's (East India Company's) servants, which was justly held to be an acknowledgment, to the benefit whereof the surety was well entitled. It is, however, undeniable that the courts of equity will look narrowly to every thing in the conduct of the obligee, which has a direct tendency to wrong the surety, and worsen his rights and equities, and will, as Lord Loughborough said, in *Rees v. Berington*, "lay hold of such errors to release him." The error, however, in the present case arises in supposing that any want of care on the party's side in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the sureties, equities, or diminution of his rights at law. However, we need not discuss such questions in this case, nor deal with the English decision in *Vernon of Montague v. Treadcroft*, which was that of a positive and express covenant given to the surety by the obligee; neither are we called upon to dispute the doctrine of the Court below here laid down, and in *Mein v. Hardy*, in 8 Shaw, 346, that where any one gives security for the conduct of another in a certain office which brings him in contact with persons also in the office, he has a right to expect that these persons will, in all things affecting the surety, conduct themselves according to law, and discharge their duties. All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the



party taking the security has, by his conduct, either prevented the things from being done, or connived at their omission ; or enabled, and clearly enabled the person to do what he ought not to have done, or leave undone what he ought to have done; and that but for such conduct this omission or commission would not have happened. The present is any thing rather than such a case; the facts are not here to ground any such conclusion; and therefore I am of opinion that the surety, Robert Watson, was not discharged. I have therefore to move your Lordships that the decree appealed from be reversed, and that you remit to the Court below, with instructions to decree, in terms of the second conclusion of the libelled summons, that is, the conclusion relating to Watson, the only party here before your Lordships.

M'TAGGART  
and others

v.  
WATSON..

16th Apr. 1835.

The House of Lords ordered and adjudged, That the interlocutors, so far as complained of in the said appeal be, and the same are hereby reversed: And it is further ordered, That the cause be remitted back to the Court of Session in Scotland, with instructions to decern against the respondent William Watson, in terms of the second conclusion of the libelled summons, and to do further in the cause as shall be just and consistent with this judgment.

MONCRIEFF and WEBSTER—ALLISTON, SMITH, LOCK,  
and ALLISTON—Solicitors.

[18th April 1835.]

Lieut. Gen. MATTHEW SHARPE, Appellant.

*Sir John Campbell — Keay.*

CHARLES KIRKPATRICK SHARPE and others, Respondents.

*Entail — Clause.*—Circumstances in which held (reversing the judgment of the Court of Session) that the syntax of the irritant clause of an entail being defective, from a clerical omission which might by possibility have been supplied by other words than those which the context indicated to have been intended to be inserted, the entail was insufficient to prevent the heir in possession from selling or burdening the lands.

MATTHEW SHARPE Esquire of Hoddum executed a deed of entail on the 6th of July 1748, and another on the 7th of March 1754; but as both of these deeds were revoked, it is not necessary to take farther notice of them. He also made a third entail, dated 1st August 1765, which was not revoked, but it was never recorded or followed by infestment. That entail was granted in favour of himself, and the heirs male of his body; whom failing, to the heirs female of his body; whom failing, to Charles Kirkpatrick, only son of Mr. William Kirkpatrick of Elliesland, and to the other substitutes therein mentioned. Charles Kirkpatrick, although related to the entailer, was not his heir-at-law. Without adverting particularly to the different clauses in that deed, it is sufficient to state that the destination, the

subjects conveyed, and the prohibitions and conditions were (with certain trifling variations in the language, which do not bear upon the present question) the same as those in a subsequent deed of entail executed in 1768. The resolute clause was the same in the two deeds; but in the irritant clause of the entail 1765 a few words are inserted which were omitted in the subsequent entail. The irritant clause of that deed was as follows:—“ And upon every contravention which may  
 “ happen, by and through any of my said heirs failing  
 “ to perform all and each of the said conditions and provisions, and acting contrary to any or all of the restrictions and limitations before written, it is hereby expressly provided and declared, that not only my said  
 “ lands and estate shall not be burdened with or liable  
 “ to the debts and deeds, crimes and acts *of the heirs of*  
 “ *taille, as before provided, but also all debts, deeds, and*  
 “ *acts*<sup>1</sup>, contracted, granted, done, or committed, contrary to these conditions and provisions, or restrictions and limitations, or to the true intent and meaning of  
 “ these presents, shall be of no force, strength, or effect,  
 “ and ineffectual and unavailable against the other  
 “ heirs of tailzie, and who, as well as the said estate,  
 “ shall be noways burdened therewith, but free therefrom, in the same manner as if such debts or deeds  
 “ had not been contracted or granted, or such acts,  
 “ omissions, or commissions had never been done or  
 “ happened.”

In this entail of 1765 there is a reserved power of alteration or of sale in favour of the granter or the heirs of his body; “ but declaring that any revocation or

SHARPE  
 v.  
 SHARPE  
 and others.  
 —  
 18th Apr. 1835.

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<sup>1</sup> The words in italics are omitted in the entail 1768.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

“ alteration of these presents shall not be inferred by  
“ legal implications or constructions, but only from  
“ an express writing under my own hand, or under the  
“ hand of the heirs male of my body, recalling this  
“ present deed, or altering the same, in whole or in  
“ part.”

On the 19th December 1768 the entailer executed the other deed of entail alluded to, which was duly recorded in the register of tailzies on the 6th Dec. 1769. It proceeds on the narrative that “ I Matthew  
“ Sharpe of Hoddum, for the better preservation of my  
“ family, and continuance of my estate with my rela-  
“ tions and heirs of taillie after mentioned, do by  
“ these presents, under the conditions, provisions, res-  
“ trictions and limitations, clauses irritant and reso-  
“ lutive, declarations and reservations, after written,  
“ give, grant, and dispone, heritably and irredeemably,  
“ to myself and the heirs male of my body, without  
“ any restriction, limitation, or condition whatever;  
“ whom failing, to the heirs female of my body, the  
“ eldest heir female always succeeding without division;  
“ whom failing, to Charles Kirkpatrick, only lawful  
“ son of Mr. William Kirkpatrick of Elliesland,” and the other substitutes therein enumerated, the estate of Hoddum.

The first condition is, that the heirs should bear the name and arms of Sharpe of Hoddum. The next two conditions were, “ that the whole heirs hereby called  
“ to the succession of my estate shall possess and enjoy  
“ the said lands and estate by virtue of this present  
“ taillie, infeftments, rights, and conveyances to follow  
“ hereupon, and by no other right or title whatsoever :

“ And with and under this condition also, as it is  
 “ hereby specially provided and declared, that the  
 “ whole heirs foresaid shall be obliged to engross, and  
 “ verbatim insert, the whole foresaid course and order  
 “ of succession, and the several conditions, limitations,  
 “ provisions, irritancies, and others before and after  
 “ mentioned and contained in this present taillie, or  
 “ to be contained in any other deed or writing to be  
 “ hereafter granted by me relative hereto, in the in-  
 “ struments of resignation, charters, services, and re-  
 “ tours, precepts thereon, precepts and instruments of  
 “ sasine, and in all other conveyances of the said lands  
 “ and estate.”

SHARPE  
 v.  
 SHARPE  
 and others.  
 —  
 18th Apr. 1835.

After setting forth sundry other conditions the deed prohibits any alteration in the order of succession ; and then provides, “ That the whole heirs aforesaid are and  
 “ shall be limited and restrained from selling, alien-  
 “ ating, impignoring, or disposing the said lands and  
 “ estate, or any part thereof, either irredeemably or  
 “ under reversion, and from burdening the same, in  
 “ whole or in part, with debts or sums of money, in-  
 “ feftments of annual rent, or any other servitude or  
 “ burden whatsoever, (excepting only as herein-after  
 “ mentioned,) and from doing or committing any act  
 “ civil or criminal, and granting any deed, directly or  
 “ indirectly, whereby the said lands and estate or any  
 “ part thereof may be affected, apprised, or adjudged,  
 “ forfeited, or become escheat or confiscated, or any  
 “ other manner of way evicted from the said heirs of  
 “ taillie, or this present taillie or order of succession  
 “ prejudged, hurt, or changed.”

The deed also contains this restriction :—“ That the

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

“ said lands and estate shall noways be affected or  
“ burdened with, or subjected or liable to be adjudged,  
“ apprised, or any other way evicted, either in whole  
“ or in part, for or by the debts and deeds contracted  
“ or granted by any of the foresaid heirs, whether  
“ before or after their succession, nor for or by any  
“ act, civil or criminal, committed and done, or to be  
“ committed and done, prior or posterior to their suc-  
“ cession.”

After setting forth various other restrictions and sundry irritancies, the deed contains a resolute clause, providing, “ That in case any of the heirs aforesaid  
“ shall contravene the other conditions, provisions, re-  
“ strictions, or limitations before or after mentioned, or  
“ any of them, that is, shall fail or neglect to implement  
“ and perform the said other conditions and provisions,  
“ and each of them, or shall act contrary to the other  
“ restrictions and limitations, or any of them, that then,  
“ and in any of these cases, the person or persons so  
“ contravening by failing to obey the said conditions  
“ and provisions, or acting contrary to the said restric-  
“ tions and limitations, or any of them, shall, for him  
“ or herself, and the heirs descending of his or her  
“ body respectively, ipso facto amit, lose, and forfeit all  
“ right, title, and interest which they respectively have  
“ or shall have to my said lands, and the same shall  
“ become void and extinct, and my said lands and  
“ estate shall devolve, accresce, and belong to the next  
“ heir of taillie appointed to succeed, in the same  
“ manner as if the contravener and the heirs descend-  
“ ing of his or her body were all naturally dead.”

Then follows the irritant clause in these words:—

“ And upon every contravention which may happen by  
 “ and through any of the said heirs failing to perform  
 “ all and each of the said conditions and provisions,  
 “ and acting contrary to any or all of the restrictions  
 “ and limitations before written, it is hereby expressly  
 “ provided and declared, that not only my said lands  
 “ and estate shall not be burdened with or liable to  
 “ the debts and deeds, crimes and acts<sup>1</sup>, contracted,  
 “ granted, done, or committed contrary to these con-  
 “ ditions and provisions, or restrictions and limitations,  
 “ or to the true intent and meaning of these presents,  
 “ shall be of no force, strength, or effect, and ineffectual  
 “ and unavailable against the other heirs of taillie, and  
 “ who, as well as the said estate, shall be noways bur-  
 “ dened therewith, but free therefrom, in the same  
 “ manner as if such debts or deeds had not been con-  
 “ tracted or granted, or such deeds, omissions, or com-  
 “ missions had never been done or happened.”

SHARPE  
 v.  
 SHARPE  
 and others.  
 —  
 18th Apr. 1835.

This deed contains various other clauses, which do  
 not bear upon the present question, and these are  
 followed by this clause of revocation:—“ And I, by  
 “ these presents, revoke and recal all former settle-  
 “ ments made and granted by me of and concerning  
 “ my said lands and estate, or any part thereof, in  
 “ favour of whatever person or persons, and particu-  
 “ larly without prejudice to the said generality, a deed  
 “ of entail and settlement executed by me, of date the  
 “ 6th day of July 1748, and another deed of entail and  
 “ settlement, dated the 7th day of March 1754 years,

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<sup>1</sup> Here the words “ of the heirs of taillie as before provided, but also all  
 debts, deeds, and acts ” in the entail of 1765 are omitted.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

“ in the whole heads, clauses, and contents thereof,  
“ and declare the same to be void and null, and of no  
“ force or effect, in all time coming, as if the same had  
“ never been made or granted.”

Besides the landed estate Matthew Sharpe left some moveable property, which by a deed of the same date with the last entail, and two subsequent trust deeds dated 19th May 1769, he conveyed to trustees, for certain purposes, and particularly that the residue should be applied in the purchase of lands as contiguous to Hoddum as could be procured, which were to be entailed in the same way as that estate. These trustees died, and in consequence Mr. Richard Mackenzie, W. S., was appointed by the Court to the office of judicial factor, for executing the purposes of the trust. In the course of his management some lands were purchased and entailed, in compliance with Matthew Sharpe's directions; and he still held a small unappropriated balance in his hands.

Matthew Sharpe died without heirs of his body; and the first in succession under the destination was Charles Kirkpatrick, the father of General Sharpe the appellant and of Charles Kirkpatrick Sharpe the respondent. Charles Kirkpatrick Sharpe in February 1770 made up his title as heir of tailzie and provision under the recorded entail of 1768. On his death in 1813 his eldest son, General Sharpe, made up his titles under the same entail, and on that title has ever since been in possession of the estate, including the lands contained in the deed of entail executed by Mr. Mackenzie.

Upon these facts an action of declarator was instituted



by the appellant before the Court of Session, concluding in substance that he had an absolute right to the estate, and power to sell or burden it at his pleasure.

SHARPE  
v.  
SHARPE  
and others.

18th Apr. 1835.

This was resisted by the respondents, who were subsequent heirs of entail. Lord Corehouse on 22d May 1832 pronounced the following interlocutor, and issued the explanatory note attached to it:—"The  
" Lord Ordinary having considered the revised cases  
" for the parties, productions, and whole process, finds,  
" that the tailzies in question are affected with valid  
" and sufficient irritant and resolute clauses, and  
" therefore sustains the defences, assoilzies the defen-  
" ders from the conclusions of the libel, and decerns  
" under certain reservations, but finds no expences  
" due."

" Note.—That the omission in the irritant clause in  
" this entail is merely clerical appears obvious from  
" the structure of the sentence, which is altogether  
" ungrammatical, in consequence of the nominative in  
" the second member being wanting. It is first  
" declared, that not only the lands shall not be bur-  
" dened with or liable for the debts and deeds, crimes  
" and acts, contracted, granted, done, or committed in  
" contravention. Here the syntax is interrupted; then  
" follows, ' shall be of no force, strength, or effect, and  
" ' ineffectual and unavailable against the other heirs  
" ' of tailzie, and who, as well as the said lands, shall  
" ' be nowise burdened therewith, but free therefrom,  
" ' in the same manner as if such debts or deeds had  
" ' not been contracted or granted, or such deeds,  
" ' omissions, or commissions, had never been done nor  
" ' happened ;' coupling the effect of the relative

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

“ adverbs ‘therewith’ and ‘therefrom’, which neces-  
“ sarily refer to the omitted nominative, with the effect  
“ of the relative pronoun ‘such,’ which connects that  
“ nominative with the words that follow, it is a plain,  
“ if not indeed a necessary inference, that the acts of  
“ contravention mentioned at the commencement of the  
“ sentence, and repeated at the close, constitute that  
“ nominative, and are those which are declared to be  
“ of ‘no force, strength, or effect.’ To supply omis-  
“ sions in a deed by conjectures however plausible,  
“ or deductions however clear, with regard to the  
“ intentions of the maker, is very different from re-  
“ storing the syntax of the deed, defective in con-  
“ sequence of a clerical error, by means of a reference  
“ to the context itself; the first is at variance with the  
“ principles of construction applied to all deeds stricti  
“ juris, and with peculiar rigour to entails; but the  
“ second is consistent with those principles, and was  
“ admitted by this Court and the House of Lords in  
“ the case of Munro of Fowlis, cited by the defenders.  
“ In that case as in this, the irritant clause was un-  
“ grammatical, and, without amendment, unintelligible,  
“ the syntax being broken by a clerical omission. The  
“ entailer appointed the lands to be resigned into the  
“ hands of the superior or his commissioners, ‘to be  
“ ‘made and granted to me, whom failing, to Hugh  
“ ‘Munro,’ &c. The words, ‘for new infeftments,’  
“ were omitted. It was pleaded by the defenders, in  
“ the declarator brought for setting aside the deed,  
“ that the clause as it stood was correct, because the  
“ lands were resigned into the hands of the superior to  
“ be granted. But that plea was obviously untenable,

“ because they were resigned ‘to be made and granted;’  
 “ and although the superior could grant the lands, he  
 “ could not make them. That, therefore, which was to  
 “ be made and granted was something not named or  
 “ expressed, but which the Court supplied by intend-  
 “ ment from the context, namely ‘for new infeftments.’  
 “ It is said that the omission in the present case might,  
 “ perhaps, have been debts and deeds, or debts and  
 “ crimes, or debts only, and if such words were inserted,  
 “ the irritant clause would still be defective; but the  
 “ same argument might have been used in the Fowlis  
 “ case. The lands might have been resigned, not for  
 “ new infeftment, but for a lease, a wadset, or some  
 “ other grant which would not have constituted an  
 “ effectual tailzie. But the context in that case, as in  
 “ this, excluded all such gratuitous suppositions. Con-  
 “ struction by inference was carried still farther in the  
 “ Roxburgh case, where the words ‘heirs male’ in the  
 “ destination were read, ‘heirs male of the body,’  
 “ although the syntax was correct without that inter-  
 “ polation, and the context gave very little assistance  
 “ in its support.”

SHARPE  
 v.  
 SHARPE  
 and others.  
 —  
 18th Apr. 1835.

Against this interlocutor a reclaiming note was pre-  
 sented by the appellant; and a counter note was also  
 presented by the respondents in so far as they were found  
 not entitled to expences. The Court (First Division),  
 on 3d July 1832, pronounced this interlocutor:—  
 “ The lords having advised this note, and heard  
 “ counsel for the parties, adhere to the interlocutor  
 “ of the Lord Ordinary in so far as his lordship  
 “ thereby sustains the defences and assoilzies the  
 “ defenders; but alter the same in so far as his lord-

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

“ ship finds no expences due, and find the pursuer  
“ liable to the defender, Charles Kirkpatrick Sharpe  
“ esq., in the expences incurred by him, and remit  
“ the account thereof to the auditor of court to tax the  
“ same and to report.”

General Sharpe appealed.<sup>1</sup>

*Appellant.*—It is essential to every effectual entail, under the statute 1685, chap. 22, that it contain a clause explicitly declaring the acts done in contravention of it to be void and null. No acts or deeds done by an heir of entail can be irritated or annulled by force of the entail unless they are expressly enumerated in the declaration of nullity which is contained in the irritant clause; and consequently no prohibition can, without such enumeration, be rendered effectual to debar the heir in possession from doing or granting the acts or deeds prohibited.

The deed of entail executed in 1768 does not contain an effectual irritant clause in terms of the statute; it does not declare the acts of contravention of the heirs of taillie to be null and void. It has been admitted on all hands, that the clause, as it stands in the entail and in the investitures, is absolutely unintelligible, and that, in order to extract from it any meaning whatever, a material change must be made upon its structure, and important words must be supplied.

But the principle of construction which is applicable to deeds of entail, is, that they are *strictissimi juris*.

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<sup>1</sup> S., D., & B. 751.

No restraint, though evidently intended by the maker, nor any prohibition or irritancy, is to be raised against an heir of entail, from implication or inference ; so that if any clause should be omitted (perhaps per incuriam), which by the established form is made use of in creating a limitation, the Court does not interpose or supply the defect.<sup>1</sup> Numerous well-known cases have occurred, in which effect has been denied to the most obvious intention of the granter.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

It is impossible to say that the words requisite to restore the grammatical construction can be ascertained with certainty. Parties may indulge in plausible conjectures ; but still there are many forms of expression by each of which sense might be restored to the passage, and yet its legal effect be infinitely varied. It seems to be thought that all dubiety is removed by the context, and that the four words enumerated there (“debts, “deeds, crimes, and acts”) ought to form the nominative in the second branch of the clause. Yet it is quite certain that if even one only of those four words (“debts,” for example,) had been inserted as that nominative it would have been impossible for the Court to have inserted any other word, however apparent the intention of the granter might be deemed ; and it is not a little remarkable that not only do the two respondents differ entirely in their ideas regarding the words which are wanting, but when the respondent, Mr. Sharpe, seeks to point out in what way the chasm should be filled up he actually omits one of the four

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<sup>1</sup> Sandford on Entails, Ed. 1822. p. 158. and Ersk. B. 3. tit. 8.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

words ("crimes") which are contained in the context. Quomodo constat that any other of those four words might not as well have been left out?

This case, therefore, is essentially different from those cases in which a clerical error or omission is of such a description that it can be supplied only in one way, and in no other. Such was the case of Munro of Fowlis. There, in a mere phrase of fixed style, certain well-known technical words were omitted. The lands were directed to be resigned "in the hands of my immediate lawful superiors of the same, or of their commissioners having power to receive resignations and to grant new infeftments [for new infeftment<sup>1</sup>], to be made and granted to me the said Sir Harry Munro, myself, whom failing," &c. The Lord Ordinary has held, that the present case ought to be regulated by the decision in the case of Fowlis, because it was there as doubtful and uncertain in what way the hiatus was to be supplied, as in the present case. "The lands" (it is remarked by his lordship) "might have been resigned, not for new infeftment, but for a lease or wadset, or some other grant which would not have constituted an effectual taillie." But the supposition that the resignation could possibly have been made, not for new infeftment, but for any such grant or right as a lease, is altogether and absolutely excluded. Not only is it the invariable purpose and end of resignation in favorem into the hands of a feudal superior that the grant be renewed by infeftment, and not only were the persons to whom resignation might be made as the commissioners of the superior expressly required to

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<sup>1</sup> These three words omitted.

possess the powers of granting new infestment, but the whole provisions of the deed have direct reference to the heirs of entail making up their title by charter and seisin, and in no other way. The supposition, therefore, that the resignation might have been intended to be made, not for new infestment, but for some such right as a lease, was altogether excluded in the case of Fowlis, and there was no ground for the slightest doubt or uncertainty as to the only possible way in which the error could be corrected. But to supply the defect in the present case it is a matter of mere conjecture; and in determining what words ought to be inserted (which has not been done by the Court below) this House must discriminate between various methods differing in their legal effects, but each of them capable of being supported by arguments equally plausible. In this respect the present case essentially differs from that of Fowlis; and indeed the judgment appealed from has stretched the fixed principles of construction much farther, in order to invest this deed with effectual fetters, than has ever yet been done in favour of entails.<sup>1</sup>

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

*Respondents.*—From the irritant clause, as it stands, it clearly appears, that what in one member of that clause are declared to be “of no force, strength, or effect, and ineffectual and unavailable,” consist of all and each of those very debts and deeds, crimes and acts, which are prohibited in the other clauses of the entail.

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<sup>1</sup> *Appellant's Authorities.*—Mitchelson v. Atkinson, 15 June 1831, (9 S., D., & B. 741); Dick v. Drysdale, 14 Jan. 1812, (F. C.); Elliot v. Pott, 16 March 1814, (F. C.); Robertson Barclay v. Adam, 18 May 1821, (1 Shaw's App. Cases, 24); 3 Ersk. B. tit. 8. s. 29.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

The main ground upon which this entail is now attacked, is, that that branch of the irritant clause which contains the above declaration does not set forth that those things which are thus to have no force, strength, or effect, &c., are those debts and deeds, crimes and acts, which are prohibited in the deed. The irritant clause, independent altogether of this member of it, would completely satisfy all that is required by the statute 1685, and consequently would be effectual even although that clause itself did not afford the means of supplying the nominative of this one branch of it. But this irritant clause itself furnishes the materials for supplying this omission. It will be observed that this omission occurs only in that member of the irritant clause in which the deeds of contravention were intended to be declared inept against the heirs of entail themselves. But on the one hand this declaration is immediately preceded by that member of the clause, which declares these deeds of contravention inept against the estate itself; and on the other hand it is immediately followed by another member of the clause declaring the extent to which the heirs personally, as well as the estate itself, were thus to be exempted from the effect of such deeds of contravention; and in both of these the prohibited debts and deeds, crimes and acts, are mentioned in such a manner as shows clearly that they are the very things which, in that part of the irritant clause now under consideration, are declared to be “of no force, strength, or effect, and ineffectual and “unavailable,” against the heirs of entail.

Thus, in the immediately preceding member of the clause, after stating that this irritancy was to come into operation upon every contravention which might happen



by any heir, either “omitting” each of the conditions imposed upon him, or “doing or committing” any or all of those things which he was restricted from doing, the entailer proceeds to declare that these prohibited debts, deeds, crimes, and acts should be inept so far as regards the estate itself; and what deserves attention is, that these prohibited debts, deeds, crimes, and acts are spoken of in such a manner as to show that, in this very clause itself, more than one declaration is to be made regarding them, and that they are to form the subject, not only of this declaration, in reference to the estate itself, but likewise of the next declaration as to the heirs of entail themselves; for the entailer declares that “not only my said lands and “estate shall not be burdened with or liable to the “debts and deeds, crimes and acts” therein set forth. By thus prefixing the words “not only” to this declaration, he clearly indicated that some other declaration was to follow in the next member of the sentence regarding these same debts, deeds, crimes, and acts of which he was speaking; and accordingly in that next member of the clause he proceeds to state the consequences of such contraventions in reference to the other heirs of entail personally, by declaring that what is spoken of shall be of no force, strength, or effect, &c., “against the other heirs of tailzie;” and the subject of this declaration, (although omitted to be expressly repeated in this member of the sentence,) consisted of those very prohibited debts, deeds, crimes, and acts which the entailer had previously announced as the subject of this as well as of the immediately preceding one.

So, in the immediately following branch of the

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1895.

irritant clause, these prohibited debts, deeds, acts, and crimes, whether of omission or of commission, are again spoken of in such a manner as shows clearly that they also formed the subject of the declaration as to the heirs of entail; this subsequent branch of the clause contains the explanation as to the extent to which this irritancy was to operate against the prohibited debts and deeds, crimes and acts, in reference both to the heirs of entail themselves, and to the estate itself, by declaring that the one as well as the other "shall be " noways burdened therewith, but free therefrom, in " the same manner as if such debts or deeds had not " been contracted, or such deeds, omissions, or com- " missions had never been done nor happened." There is nothing wanting in this branch of the sentence. The nominative of it is expressly stated to consist both of the heirs of entail and of the entailed estate itself; and it is declared that neither of these should be burdened with, but that both should be free from, what had formed the subject of the declaration in the immediately preceding member of the clause. Thus the subjects of these two declarations in the sentence are completely identified, so that whatever points out the one, points out the other; and then the common subject of both these declarations is pointed out clearly by the explanation embodied in this last one, showing that it consisted of precisely the same prohibited debts or deeds, omissions or commissions, which had formed the subject also of all the other members of the clause.

Since the entailer himself has thus afforded the materials for completing the syntax, by what is set forth in the context, and indeed in the other parts

of this very clause itself, the clause is as effectual as if the syntax of this branch of it had been quite entire. The law upon this subject was established both by the Court of Session and by the House of Lords in the case of Munro of Fowlis, as well as previously in the Roxburgh case; and accordingly, in the Court below, the appellant never ventured to call in question the doctrine upon this subject in the note issued by Lord Corehouse, and confirmed by the Inner House; and as the entail is not challenged in this action upon any ground other than this alleged defect in the irritant clause, the judgment of the Court below is well founded.

But the clause (independent altogether of that member of it the syntax of which is defective,) is a complete irritant clause in terms of law, and quite sufficient to satisfy the requirement of the statute 1685.<sup>1</sup>

LORD BROUGHAM.—My Lords, the question which this appeal has brought before your Lordships is one of great importance for the value of the property which depends upon its decision, but of much greater, in my opinion, in regard to the point of law which it involves. The decree of the Court below sanctions a principle of

SHARPE  
v.  
SHARPE  
and others.

18th Apr. 1835.

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<sup>1</sup> *Respondents' Authorities.*—Gordon Cumming, 29 July 1761, (Mor. 15,513); Roxburgh Case, June 1827, (Mor. App. to Tailzie, Nos. 13. & 14.); Stobbs, 19 May 1803, (Mor. 15,542); 2 Black. Comm. 379; Bridgm. Jud. 435, s. 22.; Dormer v. Packhurst, (3 Atk. 135; 1 Stra. 1105); Bagshaw v. Spencer, (2 Atk. 570); Doran v. Ross, (3 Bro. C. C. 27); Douglas and Co. v. Glassford, 14 Nov. 1823, (F. C. 2 S. & D. 487); Syme v. Ronaldson Dickson, 27 Feb. 1799, (Mor. 15,473); Munro of Fowlis, 15 Feb. 1826, (4 S. & D. 467; affirmed, 3 W. & S. 344); Newhall, 23 May 1823, (F. C.); Cappedrae, 10 June 1823, (F. C.); Watson v. Blair, 16 Nov. 1831, (10 S., D., & B. 12); Nesbet, 10 June 1823, (2 S. & D. 381).

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

construction which may be of extensive application to deeds of the same kind—tailzies of Scotch estates; but if it is a sound one, this principle must be applicable to the construction of all instruments,—nay, more so in every other case than in the case of tailzies, which are well known to be, of all conveyances, those which the law regards with the most scrupulous jealousy, and interprets with the most rigorous strictness; nor is there in the question itself, considered in some points of view, any thing peculiar to the law of Scotland; and the authority of this decision could, if sanctioned by your Lordships, never be confined, nor its influence restricted, to Scotch cases. Indeed, as I know of no English instrument whatever, the construction of which is so confined within strict technical rules, I can fancy no parallel case arising in this country in which the present decision of your Lordships might not be applied *à fortiori*. If we allow a provision so essential as an irritant clause in a Scotch tailzie, where constructive intention goes for nothing, to be supplied by conjectural criticism (I can give it no other name), with what boundless licence should we not be armed in dealing with an English will, where nothing but the intention of the testator is to be regarded! Pressed by such considerations, and the acknowledged difficulty of supporting the decision below, upon the reasons there given in its favour, my Lord Chief Justice, who first heard the cause, directed that it might be argued again by one counsel of a side, and his Lordship was pleased to desire my assistance on the second hearing; I have accordingly anxiously considered the question at issue; I have attended the second hearing, and I have come to a clear and unhesitating opinion; that the decree below cannot stand. As

it was pronounced by all the judges of the Division before which it came, my profound respect for so high an authority naturally made me pause before I differed irreconcilably with their Lordships; and the same feeling induces me now to state at length the reasons upon which my own judgment has been formed.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

The Hoddam entail is framed carefully and artificially by professional men, who plainly well knew the nature of the instrument they were constructing; and it is as regular and full in all its parts as a deed of tailzie can well be, except, perhaps, that the institute is left free from all fetters, which could hardly be intended, as he (the disponent) was only a cousin. After the dispositive and destination clauses, and the usual conditions as to bearing name and arms, possessing under the entail, and so forth, there follow, in distinct order, the prohibitory clauses, against which nothing can be said, and of which the last is to forbid the estate being burdened by or in consequence of any debt, deed, or act, criminal or civil, of the heirs of tailzie, which it proceeds to declare shall not burden or affect the estate, that being, as it were, the form of the prohibition:—"And with and  
"under the restriction and limitation, as it is hereby  
"expressly conditioned and provided, that the said  
"lands and estate shall in nowise be affected or bur-  
"dened with, or subjected or liable to be adjudged,  
"apprized, or in any other way evicted, either in whole  
"or in part, for or by the debts or deeds contracted or  
"granted by any of the foresaid heirs, whether before  
"or after their succession, nor for or by any act, civil  
"or criminal, committed and done, or to be committed  
"and done, prior or posterior to their succession." Then come the irritant clauses, the first of which is what we

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

should in England call a shifting use, the second a good resolute clause; and the next the irritant clause, or clause of nullity, on which the present question arises. It begins with an apparent reference to the last of the prohibitions or restrictions which I have already cited, and its intent was apparently (we must needs always speak conjecturally when the maker of an instrument has not fully explained himself,)—apparently to add something to what he had already done. He says, “and upon  
“every contravention which may happen, by and  
“through any of my said heirs failing to perform all  
“and each of the said conditions and provisions, and  
“acting contrary to any or all of the restrictions and  
“limitations before written, it is hereby expressly pro-  
“vided and declared, that not only my said lands and  
“estate shall not be burdened with or liable to the  
“debts and deeds, crimes and acts, contracted, granted,  
“done, or committed contrary to these conditions and  
“provisions or restrictions and limitations, or to the  
“true intent and meaning of these presents, shall be of  
“no force, strength, or effect, and ineffectual and un-  
“available against the other heirs of tailzie, and who,  
“as well as the said estate, shall be no ways burdened  
“therewith, but free therefrom, in the same manner  
“as if such debts or deeds had not been contracted or  
“granted, or such deeds, omissions, or commissions had  
“never been done or happened.” In this clause the words following “not only” seem to refer to the former clause, the last prohibition or restriction; and it seems to have been intended to say, that not only this should take place which had already been provided, but something else—something further not yet provided for. No such clause, however, nor link of a clause, connected with any

particle “but” occurs; and it is said that this, and the want of grammar, or, more properly, of sense, which appears, there being a verb without a nominative case, namely, “shall be of no force,” shows some words to be omitted which the maker of the instrument had intended to insert; nor have we any occasion to doubt that this observation is correct; the collocation and the defect of grammar, or rather sense, plainly show it. I will go a step farther, and admit that if those omitted words had been immaterial, except towards completing a sense which was plain, obvious, and indisputable without them, no one could deny the propriety of supplying them, or maintain that any risk would attend the suppletory operation. If, then, the words which do appear are plainly sufficient to show the meaning of the whole, and if there can be no doubt that one, and but one, set of words has been left out,—if it is certain that the words to be supplied are of one kind, and can be of none other,—if that one only meaning could by possibility have prevailed, and been the sense intended to be expressed,—I have no hesitation in admitting, that according to every rule of construction we should have been at liberty to intend that meaning and supply those words. The whole question here is (an omission being allowed to have been made) what is the thing omitted? If the thing inserted made it perfectly certain what the thing omitted was,—that it must have been one precise thing, and could have been by no possibility any other thing,—then doubtless the case would be clear, and we should be called upon to supply the admitted defect, by taking in the matter known or ascertained to have been omitted. Suppose, for example, that there had been a nominative case, but part of the verb

SHARPE

v.

SHARPE  
and others.

18th Apr. 1835.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

had been omitted, or the nominative and verb both had appeared, but the patronymic particle had been dropt, as thus : — “ All such acts shall of no force “ and effect,” or even “ all such acts of no force and “ effect,” or “ all such acts shall be no force and “ effect,” we could safely, because certainly, have supplied “ be,” or even “ shall be,” in the one case, and “ of ” in the other ; but this is not the present omission, nor any thing like it ; all that we see is, from the defect of grammar, that something is left out. What is it ? Nothing less than the nominative—the whole matter. Of the three constituent parts of any proposition, this is truly, if not the most important, at least one as important as either of the others, and far more so than one of them ; those, then, are the nominative or objective—that which declares of what thing it is that you are about to predicate,—the subjective, or thing to be predicated,—and the connective or verb, which may be said, in a sense, to predicate, but which in truth is only auxiliary to the predication, by connecting the thing predicated with the object of which it is so predicated. There needs no further illustration to show the importance of that which is in this case left out. By the thing predicated being here nullity, and by the verb or connective “ shall be ” (which is really of little comparative importance), we see that nullity was intended to be predicated of something ; but that is all we see, and we are left to conjecture that most important point,—what it is of which nullity was to be predicated. I think this sufficiently shows the materiality of the omission. If, again, we leave out the words “ shall be,” then there may be a nominative or objective ; but we have no subjective, and nothing effectually pre-



dictated, as I shall in the sequel show. Nevertheless, I will go one step farther, and admit that, if from the rest of the sentence it had plainly appeared what this object or nominative was,—that the thing of which nullity was predicated was necessarily one thing, and could not by possibility be any other, (I cannot easily figure to myself such a case, but had one existed,) I will agree that then we might have been authorized to supply the omission. Is that the case here, or rather is not the very reverse most manifestly this case? See only how many different nominatives may be inserted, all of which equally tally with the precedent part of the sentence, fit into the general frame of the deed, and complete the grammatical structure. “Such debts” will do; it will make the clause quite sensible and perfect in grammar, and yet leave it quite imperfect as a fencing clause; or “such deeds,” or “such acts,” (which would only mean criminal acts). Then, what right have we to choose one insertion rather than any of the others; or what right have we to supply, as the Court below has done, “all such deeds, debts, and acts,” or “all such contraventions whatsoever?” This is assuming that we know these, and none other, to be the very words omitted,—that we knew the things expressed by these words, and no other things whatsoever, to be the things which it was intended to declare and to make null. Probability—conjecture—guess—may lead us to think thus, but we have no right at all to use such helps. Dr. Bentley would possibly have inserted such words with little hesitation, even had he found all the codices left them out; but courts of law, how fair so ever may seem the reason for concluding that the thing omitted was of

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

**SHARPE**  
**v.**  
**SHARPE**  
**and others.**  
—  
18th Apr. 1835.

one kind rather than any other, cannot allow themselves to act upon such reasoning, unless the things inserted make the implication necessary, and not conjectural. The only warrant for intendment with us is the sense actually expressed. Let us, after all, only consider why it is that we are rather called upon to insert these words, “all such contraventions,” than those words of lesser scope and comprehension, “all such debts,” or “all such acts.” There is really no reason whatever for the preference but one: this insertion makes the clause a complete irritancy, and the deed a perfect tailzie. But what right have we to make it such, — to elect the course of intendment or implication, which will completely fence and enforce the prohibitions, in preference to any one of the several courses which will leave those prohibitions unprotected and ineffectual? After all, it comes to this, that our choice is guided by the assumption that the framer of the deed intended to make it perfect, and not to leave it inoperative, — to fence his prohibitions, and not to leave them bare. But this assumption is quite gratuitous, and one which we have no right whatever to make, — a proposition which I need hardly stop to demonstrate. If we had any right to go upon such ground, every Scotch tailzie, how imperfect soever, would be completed in a trice; the Duntreath case, and those on which it rested, as well as all it has so justly given rise to, would at once be overthrown; for who ever doubted that the intention of the maker of all those tailzies was to fetter the disponee as well as, nay, even more than the heirs of tailzie? The Tillycoultrie case, and all that class, would in like manner be subverted; for no one ever supposed that he who had

carefully, and indeed effectually, tied up his heirs of entail from altering the order of succession in any particular, or from burdening the estate, or affecting it in any manner of way, intended to allow of its being sold the day after his decease. But in truth, if the supposed purpose of making the entail complete is allowed to guide us in any case, there is at once an end of all the law of entail, as far as construction goes, nay, an end of it altogether; for the total omission of an irritant clause, or a resolute, or both, becomes immaterial, especially if a single fragment of each, such as “with” and “and under this further irritancy, that is to say,” is found on the face of the deed; nay, all that a person seised of an estate in fee simple would have to do, in order effectually to entail it, would be to set forth the parcels, and declare the series of heirs, and then to add his direction, that a valid entail of such estate should be understood as constituted in their favour. I need hardly stop to remark, that a like latitude of construction would overturn our whole law of executory devises in England. No one, in construing such a devise, ever had a moment’s doubt of the testator’s meaning, or supposed that he intended to give nothing at all to the devisee over; consequently no limitation over could be held too remote, and in all such provisions we should be called upon to supply the words, “living” “at the death,” for the purpose of effectuating the intention. Yet absurd as this position appears, there is really no other conceivable ground for supplying the words, as the Court below has here done, — no other reason can be given for saying that the nominative left out is, “all such contraventions,” rather than many

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

other things which can be readily named, except that those larger and more comprehensive words make the irritancy effectual and the conveyance complete. The reason which I have thus given appears to me quite decisive against the decree, and leaves no necessity for further examination of the case, unless we are bound by authority, which I shall immediately consider; yet I shall so far continue my argument as to dispose of another construction, ingeniously suggested, and of another ground upon which the decree below has been rested here, though not there. The construction is this: the words “shall be of no force, strength, or effect, and ineffectual and unavailable,” are rejected as nonsense, for want of grammar, or rather of a verb, (for want of grammar is a phrase very incorrectly used throughout this argument, that defect being always immaterial where there is any intelligible sense expressed,) and then we are desired to read what remains; but first, there is another member of the sentence also to be got rid of, viz. “not only,” for else the sense is still quite imperfect. But suppose this further objection waived, and then we read the whole residue, there is an insuperable objection to thus proceeding with the sentence; the words you leave out are closely connected with those you suffer to stand; and you have no right at all to connect the words “against the other heirs of tailzie” with what the maker of the deed never thought of connecting them with, viz. “the estate shall not be burdened with acts and deeds;” he only said that something (he did not tell what) “shall not be effectual against the heirs of tailzie.” What possible right can we have, because he said, that against those heirs of

tailzie a certain thing not mentioned should be null, to make him say that against those heirs of tailzie the estate should not be burdened, when he has never said one word as to the effect of those burdens upon those heirs? No further argument needs be held to make us reject at once this construction; nay, even if we are allowed so to read the clause, it is still useless, unless we assume the truth of the proposition I am next to deal with, and for which the former assumption, were we at liberty to make it, would only clear the way. It is contended that the clause is, after all, and as it stands, a complete irritancy, and that in substance and effect it declares all acts and deeds in contravention null and void; if so, there is an end of the question. But the first difficulty which we have here to get over is, to understand how, if it be a complete irritancy, the learned judges of the Court below should have been driven to the very forced kind of construction, by supplying words which alone they resort to in support of their decree, when, without any such violence to the instrument as it stands, they might so easily have accomplished the same purpose, and supported their position. Here is a sufficient irritancy, by the respondents' present argument, and as the clause stands it is said to be enough; but yet the learned judges held it quite inoperative, unless another limb was added, and that indeed rather a head than any other member; for it is the nominative or object concerning which the proposition is to treat. Surely we must suppose that those learned persons had a very clear opinion that the clause, as it stood, was any thing rather than a perfect irritancy, when they had recourse to this device of

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

conjectural construction; and in a case like the present I should certainly hold it most perilous for your Lordships to sustain the judgment below upon a ground never relied upon by the judges, after rejecting all the grounds they had taken. But in case it should still be said that the decree may stand, though upon other reasons than were assigned by those who pronounced it, I feel bound to state that I clearly perceive why no Scotch lawyer ever thought of resting the argument for the entail upon any such view as is now pressed upon us. The law is, that in order to make the tailzie effectual, not only to prohibit and resolve, that is, forfeit in the contravener, but also declare null the thing done in contravention of the prohibition, there must be a declaration of nullity, sometimes called irritancy; but that word is also used for the clause of forfeiture, and sometimes it is used to designate both the fencing clauses together. But a nullity must in some way be declared, and it must be declared in precise and distinct terms; and though not in one set technical phrase, yet it must be declared with such precision that you read it as in the deed, and do not merely gather it by intendment. Nor have you any right whatever to say that the nullity exists, because things are stated which imply a nullity, or things which would follow from that nullity have been declared. Thus, observe the other kinds of prohibition: it would not be a valid prohibition to sell, annailzie, or dispone, were an entail to forbid “making any title to any disponee;” and yet no one so tied up could effectually sell. So it clearly is not a prohibition to sell, if you only prohibit altering the order of succession, or doing any thing

whereby the estate may be adjudged or evicted ; and yet an estate may be adjudged or evicted by the purchaser, if it be sold ; and if it be sold, the order of succession is altered with a vengeance. So here, if the acts or deeds done be null, it will follow that they cannot burden the estate, or affect the succeeding heir of tailzie. But this is not the same thing with declaring the acts or deeds null in themselves ; it is a declaration that certain things shall not have any effect against the estate or the heirs of tailzie ; it is different from a declaration, that those things shall be in themselves null and void. Those same things done by a lunatic,—his committing treason, or making a conveyance, would not burden or affect the estate ; and yet we could hardly say the acts, till impeached and tried, were null. The nullity supposed to be declared might be possibly held satisfied by application to this particular case ; but the nullity must be such as will plainly appear on the record to third parties,—those parties for whose safety the whole entail law, from the statute, perhaps from the Stormont case downward, is framed. If there had been a declaration, that the things done in contravention should neither burden the estate, nor prejudice the heirs of tailzie, and that they should not avail any purchaser, creditor, or other singular successor, the case would have stood far better for the argument I am now dealing with, and yet I should have held even that a defective nullity. As it stands, the defect is more glaring ; indeed, the nullity is only at best one declared against “ the validity of the “ things done to burden the estate, or make it liable to “ those acts.” How is this a general nullity ? How does it affect a sale ? It declares the estate free from

SHARPE  
v.  
SHARPE  
and others.

18th Apr. 1835.

SUMMERS  
 v.  
 SUMMERS  
 and others.  
 —  
 17th Apr. 1885.

debt or wadsets, but not free from the effects of sale. Suppose a sale,—is that declared void and unavailable to the purchaser, by merely saying that the estate shall not be burdened? If so, sale is implied in all clauses which relate to burdening or making liable; but this never yet was argued. The last of the prohibitions before the irritancies is larger than this, for it says “affected” as well as “burdened;” this says only “burdened” and “liable,” which refer to encumbering and not selling. It was ingeniously contended for the respondent, that acts and deeds could only have force in one of two ways, either by affecting the estate, or by binding the heirs of tailzie succeeding to it as owners in their order, and that the clause, as it stands, declares that neither the estate nor the heirs shall be affected by any acts of contravention. But this is not true; the clause only says, the estate shall not be burdened or made liable in consequence of things done, and that the heirs shall be free therefrom, that is, from the debts, deeds, crimes, and acts. This is clearly a very different thing from saying, that the estate and the heirs of tailzie shall in no manner of way be affected by any thing, whether by sale or by mortgage, done in contravention; it refers to one class of contraventions, and to one only, viz. encumbering or burdening; the words go no further in any part of the clause. And after all, this argument which I have been answering assumes that we have a right to leave out the words “not only,” and “shall be,” &c., and to tack on the following words, “against the other heirs,” which the clause connects with one set of words, to another set quite separate, the impossibility of which tacking I have before shown.



It remains only that I advert to the authorities, and these need not detain us. No one pretends that any case is directly in point,—that any authority is to be found in the books for the kind of construction by implication here propounded,—while all the general principles, laid down and recognized by the uniform course of decision upon the law of entail, are most repugnant to any such course. The Fowlis case, decided here<sup>1</sup> as well as below, is plainly distinguishable from this. Indeed, except that there was an omission in both deeds, there is no other resemblance between the two tailzies,—the clauses were complete; but in the resignation the entailor directed the lands to be resigned into the hands of the superior, not “for new infeftment,” but “to be made and granted to me and others,” and the Court and your Lordships supplied “for new infeftment.” But first, the “new infeftment” supplied of necessity followed from the resignation expressed, and the new series of heirs specified, beginning with the resigner himself; next, there was literally, and without supplying any thing, enough to accomplish the intent, rejecting only “made” as surplusage. Thus it stood that the lands were resigned into the superior’s hands, “to be made and granted” to him and others. Lord Corehouse indeed denies this reading of “granted,” because “made” does not apply he thinks to a grant of lands; it may nowever be read “made over and granted.” Is the supplying “over,” in that case, any thing like supplying the whole thing to be declared null in the present case of Hoddum? However, I take leave to deny that there is

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835

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<sup>1</sup> Munro v. Munro, 25th July 1828, 3 W. & S. 344.

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1835.

any harm in rejecting “made” altogether as inapplicable to the conveyance of lands, while “granted,” the most appropriate word of all we know for such a purpose, was actually in the clause. With respect to the other authorities: The Roxburgh case really has no kind of application. In Langston v. Langston, your Lordships and the Court of Common Pleas held that a limitation to the second, third, fourth, and “other sons” included the eldest, not because you supplied the line, which had in point of fact been omitted in engrossing from the draft, (for that fact you had no right to know any thing of,) but because the words “other sons” do literally include the eldest; and though generally used for younger sons not specified, those words are so used only, because generally the first son is specified, in which case “other” must mean the younger. There was, moreover, in that instrument a charge by way of term for the daughters; and had the first son not been included, the absurdity would have followed of an estate being limited to A., burdened with a charge in A.’s favour,—a kind of argument quite applicable to the case of a will, but which never could have found a place in any discussion arising on the clauses of a Scotch tailzie. For these reasons, I have no hesitation in recommending your Lordships to reverse the decree in this case, and declaring the entail insufficient to prevent the heirs of tailzie from selling, disposing, burdening, &c., in terms of the conclusions of the summons, and to remit to the Court of Session to proceed further therein. My Lords, it is very satisfactory to know that the learned Chief Justice of the Court of King’s Bench, with whom I heard the second argument in this case,

agrees entirely in the views I have taken, and that the Lord Chief Baron, who, though not now present, attended the second argument, also concurs generally in the views I have taken the liberty of stating. And, my Lords, it is a great satisfaction to reflect, that for the third time in this case the decisions of your Lordships House preserve the Scotch law entire. I refer to the decision in 1770 of the Duntreath case by Lord Mansfield; the judgment which your Lordships pronounced very lately in the Herbertshire case; and the case now before your Lordships; and I have no manner of doubt that the candour and learning, as well as acuteness of the learned judges in the Court below, will induce them to receive these reasons (which I have thought it right to put into an authentic shape) in good part, and that they will upon this occasion come to the opinion to which they have in former cases come, that though our decision overrules their decree, yet it is framed according to the principles of the law of Scotland, adheres to the law, and supports the law, not permitting it to be altered by judicial construction. If it is to be altered, it must be done by authority of the legislature. I am far from saying that no change is required; but I am very clear that it is not to be made by any court other than the High Court of Parliament.

SHARPE  
v.  
SHARPE  
and others.

18th Apr. 1835.

LORD DENMAN.—My Lords, I think it proper to say, that having on the first hearing of this case felt doubts, those doubts have been completely removed by the subsequent argument. My noble and learned friend has most fully expressed my opinions; and entirely agreeing

SHARPE  
v.  
SHARPE  
and others.  
—  
18th Apr. 1895.

in the view he has taken, I do not think it necessary to trouble your Lordships by recapitulating the reasons which have been so ably stated by him.

The House of Lords declared, That the disposition and deed of entail is not sufficient to prevent the said appellant and the other heirs of entail from selling or otherwise disposing or burthening with debt the said entailed estates, or from gratuitously alienating or disposing of the same: And it is therefore ordered and adjudged, That the several interlocutors complained of in the said appeal be and the same are hereby reversed: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, to do therein as shall be just, and consistent with this judgment.

RICHARDSON and CONNELL,—SPOTTISWOODE and  
ROBERTSON,—Solicitors.

[16th April 1835.]

THOMAS Earl of ELGIN and his Trustees, Appellants  
and Respondents.—*Lushington — Kaye.*

Sir CHARLES HALKETT Baronet, Respondent and  
Appellant.—*Tinney — J. A. Murray.*

*Lease—Remuneration—Coal.*—1. Circumstances in which the tenant of two separate coal fields (between which a coal field of his own was situated), with a right to the use of a level for working the fields let to him, was held (affirming the judgment of the Court of Session) liable to pay the landlord a consideration for the benefit which the tenant derived from carrying the level through his own interjected field in passing onwards to the upper coal field let to him. 2. In estimating the benefit so derived it is competent to take into view the facilities which the tenant enjoyed as to draining his own field, either from the porous nature of the strata, or the possession of another level.

*Interest.*—Interest allowed on the consideration awarded from the date of the summons.

*Process.*—After a remit had been made to a judicial inspector to report, and he reported, a remit to the Jury Court refused.

JOHN Wedderburn of Gosford (afterwards Sir John Halkett) was, prior to the year 1769, proprietor of the village and harbour of Limekilns, situated on the north side of the Frith of Forth, and also of the estate of Pitfirrane, distant about two miles farther to the north from that frith.

2D DIVISION.

Ld. Mackenzie.

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 ———  
 16th Apr. 1835.

Lady Murray Kinnynmond, wife of Sir Gilbert Elliot, was at the same time proprietrix of the estate of Urquhart, which lies immediately adjacent to, and on the north-east side of the estate of Pitfirrane.

The lands both of the estate of Pitfirrane and of Urquhart were richly stored with coal. Each of the fields of coal had a level or drain, for the purpose of removing the water ; the one being known by the name of the Pitfirrane Level, and the other by that of the Urquhart Level. The Pitfirrane Level was forty-four feet deeper than the Urquhart Level.

In the month of September 1769 Lady Murray Kinnynmond, with consent of her husband, entered into a contract of lease with John Wedderburn, setting forth that, “Whereas the coal of Urquhart, after mentioned, belonging in property to the said Dame Agnes Murray Kinnynmond and her said husband, has for some years past been wrought as deep as it can be drained by the level called the Urquhart Level, the only level in the possession of the said Dame Agnes Murray Kinnynmond : But whereas the level of the coal of Pitfirrane, which lies contiguous to the Urquhart coal, and is forty-four feet deeper than the Urquhart Level, by its being communicated to the coal of Urquhart will admit of a great deal more of the said Urquhart coal to be raised ;” she therefore let for fifty years from Martinmas 1768, “to the said John Wedderburn, and his heirs and assignees whatsoever, all the coals, of whatever kind, lying under and within the lands and estate of Urquhart, in the parish of Dunfermline and shire of Fife, that can or may be wrought level-free by the present level of Pitfirrane coal, but no more ; that is to say, debarring all liberty

“ of working any coal deeper than the present Pitfirrane  
 “ Level, when brought within the lands of Urquhart.”  
 It was further “ agreed to by both parties, and provided  
 “ and declared, that in case the said John Wedderburn  
 “ or his aforesaid shall at any time during the cur-  
 “ rency of this lease communicate any level that may  
 “ be driven or made by them through the lands of  
 “ Urquhart, for working the coal hereby set, to any  
 “ third party, proprietors of any neighbouring grounds  
 “ or coal, then and in that case the said John Wedder-  
 “ burn and his aforesaid shall pay to the said Dame  
 “ Agnes Murray Kinnymond one third part of the  
 “ price or consideration-money which he shall receive  
 “ for the benefit of the said level ;” and it was stipulated,  
 “ if, after expiration of this lease, or sooner determina-  
 “ tion thereof, the said Dame Agnes Murray Kinnyn-  
 “ mond shall communicate the above-mentioned level to  
 “ any neighbouring proprietor of grounds or coal, that  
 “ then and in that case she shall be obliged to pay to  
 “ the said John Wedderburn or his aforesaid two  
 “ third parts of the price she or her aforesaid shall  
 “ receive, for the benefit of the said level.” John Wed-  
 derburn was likewise bound “ to preserve and secure the  
 “ level-rooms in each seam of coal, so as, at the end of  
 “ this tack, or sooner determination thereof, each of  
 “ them shall be left in such a sufficient secure condition  
 “ as people of skill may with ease go through and in-  
 “ spect the same, and shall not do any thing that may  
 “ hurt or prevent the working of any coal that may be  
 “ left in the ground, and lying below the Pitfirrane  
 “ Level.” His lease was to endure till Martinmas 1818.

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 —  
 16th Apr. 1835.

In December 1771 John Wedderburn (now Sir  
 John Halkett) granted a lease of the coal and other

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.

16th Apr. 1835.

minerals within the estate of Pitfirrane, to William Caddell and Co., for fifty years from and after Martinmas of that year. By this lease it was stipulated “ that  
“ the right of communicating Pitfirrane and Urquhart  
“ Levels to any adjacent heritors, and any advantages  
“ arising therefrom, is reserved to the said John Halkett  
“ and his foresaids, without whose consent the lessees are  
“ to make no such communication.” And Caddell and Co. became bound “ to carry on the levels and work the  
“ coal regularly, so as that what coal may remain in the  
“ foresaid lands at the expiration of this lease, or sooner  
“ determination thereof, shall be left in proper order  
“ and in a good workable way, and the level and level-  
“ rooms in good order, which the said John Halkett or  
“ his foresaids shall have power to inspect, and cause  
“ proper persons of skill to visit from time to time, to  
“ see that the levels are regularly carried on.” This lease did not expire till Martinmas 1821. He at the same time executed an assignation in favour of Caddell and Co. of the lease which Lady Murray Kinnynmond had granted of the coal within the estate of Urquhart.

In 1790 Lord Elgin acquired the coal fields of Clune, and of certain other lands which were situated to the north of the estate of Pitfirrane, and lay interjected between it and the lands of Balmule, which, as well as Pitfirrane, belong to Sir John Halkett.

Caddell and Co., in 1799, assigned to Lord Elgin the lease which had been granted of the Pitfirrane coal by Sir John Halkett, and also transferred to his lordship the lease originally granted by Lady Murray Kinnynmond of the Urquhart coal.

The Respondent, Sir Charles Halkett, having succeeded to Sir John, a deed of agreement and submission



was entered into between him and Lord Elgin, on the 13th November 1809, by which Sir Charles agreed to convey to Lord Elgin, his heirs and successors, “ all his  
 “ property and superiority in the village of Limekilns  
 “ and adjacent parts, situated to the south of the road  
 “ leading from North Queensferry to Torryburn, and  
 “ also his harbour of Limekilns, and shore dues belong-  
 “ ing thereto ; and also to grant a tack in favour of the  
 “ said earl and his foresaids, for the period of 999  
 “ years after Martinmas 1821, of the whole coals and  
 “ ironstone belonging to him, and lying under the  
 “ lands of Pitfirrane and Balmule, in the county of  
 “ Fife, which are presently possessed by the said earl ;  
 “ and also the exclusive right to waggonway-leave  
 “ through his grounds, and to the levels necessary for  
 “ working the said coals and ironstone, so far as in his  
 “ lands, &c. And for which causes, and upon the other  
 “ part, the said earl agrees to pay to the said Sir Charles  
 “ Halkett, and his heirs, executors, and assignees,  
 “ 10,000*l.* sterling, with interest from Martinmas 1808,  
 “ being the said earl’s term of entry to the said pro-  
 “ perty and superiority and harbour, at the following  
 “ periods ; viz. 5,000*l.* sterling at the term of Candlemas  
 “ next, and 5,000*l.*, with the by-gone interest, at the  
 “ term of Martinmas in the year 1810, and also such  
 “ rent or royalty, in the option of the said Sir Charles  
 “ Halkett or his foresaids, for the said coals and iron-  
 “ stone, as shall appear to the arbiters or oversmen  
 “ after-named fair and reasonable, after deducting the  
 “ value of the sum paid as a grassum therefor out of  
 “ the said sum of 10,000*l.*, with interest from Martinmas  
 “ 1808 ; from which sum of 10,000*l.*, the price or value of  
 “ the said property, superiority, and harbour at Lime-

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 —  
 16th Apr. 1835.

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 —  
 16th Apr. 1835.

“ kilns is in the first place to be allowed, and the re-  
 “ mainder to be the grassum ; and which rent or royalty  
 “ shall be payable at the term of Martinmas yearly, aye  
 “ and until the issue of the tack, or until the said earl  
 “ or his said foresaids shall relinquish it altogether,  
 “ which they are authorized to do at any term of Mar-  
 “ tinmas after the said coals and ironstone shall be  
 “ found to be so worked out or in such a situation as  
 “ not to afford, by fair and ordinary exertions, a royalty  
 “ equal to the amount of the rent which shall be fixed  
 “ by the arbiters, in the event of Sir Charles Halkett’s  
 “ choosing at any time to take a rent instead of a  
 “ royalty, and on the said earl and his foresaids giving  
 “ six months previous notice of their intentions so to  
 “ do.”

By a subsequent clause the parties state, that, “ having  
 “ entire confidence in the arbiters after named, for  
 “ settling the points after-mentioned relative to the said  
 “ agreement, therefore they have submitted and refer-  
 “ red, and do by these presents submit and refer, to  
 “ the amicable decision, final sentence, and decret  
 “ arbitral to be given forth and pronounced by James  
 “ Stuart, Esq., younger, of Dunearn, and David Black,  
 “ Esq., of Bandrum, or by any oversman whom they are  
 “ hereby empowered to name in case of their differing in  
 “ opinion, what shall be the price to be paid by the said  
 “ earl to the said Sir Charles Halkett for the property  
 “ and rights to be conveyed by him to the said earl as  
 “ aforesaid, and also what rent or royalty, in the option  
 “ of the said Sir Charles Halkett or his heirs and suc-  
 “ cessors, shall be paid yearly for the said coals and  
 “ ironstone, on the terms and for the period before  
 “ mentioned ; and with full power to the said arbiters

“ or oversman to fix the terms of the disposition of the  
 “ said property, superiority, and harbour at Limekilns,  
 “ to be granted by the said Sir Charles Halkett to the  
 “ said Thomas Earl of Elgin and Kincardine, and of  
 “ the said tack to be entered into between the said  
 “ parties, according to a fair interpretation of the  
 “ articles of agreement herein contained ; and, generally,  
 “ to ordain the parties to execute the deeds necessary  
 “ for carrying the transaction herein agreed on into  
 “ complete execution.” The arbiters, on the 25th of  
 March 1815, pronounced a decree arbitral, by which  
 they found “ that the price of the property and supe-  
 “ riority of the village of Limekilns, &c., payable by the  
 “ said Thomas Earl of Elgin and Kincardine to the  
 “ said Sir Charles Halkett as at Martinmas 1808, is  
 “ 7,182*l.* 13*s.* 9½*d.* sterling, leaving a balance of the  
 “ said sum of 10,000*l.* amounting to 2,817*l.* 6*s.* 2½*d.*,  
 “ which, with interest thereof from Martinmas 1808 to  
 “ Martinmas 1821, we hereby declare to be the grassum  
 “ for the tack of the said coal and ironstone, as before  
 “ mentioned, of which grassum repayment is to be made  
 “ to the said earl and his foresaids in the way pointed  
 “ out in the said tack, and in no other way ; it being  
 “ the understanding of the parties, at entering into the  
 “ said contract, that the sum of 10,000*l.* was at all  
 “ events to be payable by the said earl to the said Sir  
 “ Charles Halkett as at Martinmas 1808. 2dly, we  
 “ decern and ordain the said Sir Charles Halkett and  
 “ the said Thomas Earl of Elgin, as soon as the said  
 “ earl makes payment to the said Sir Charles Halkett  
 “ of the foresaid sum of 10,000*l.* sterling, stipulated by  
 “ the said contract to be paid in equal proportions at

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 —  
 16th Apr. 1835.

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 —  
 16th Apr. 1835.

“ Candlemas and Martinmas 1810, with interest from  
 “ Martinmas 1808, to subscribe the following deeds,  
 “ agreeably to scrolls or drafts thereof subscribed by us  
 “ of this date, as relative hereto; that is to say, we de-  
 “ cern and ordain the said Sir Charles Halkett to sub-  
 “ scribe a disposition of the said property and superiority  
 “ of Limekilns in favour of the said earl; and we de-  
 “ cern and ordain the said Charles Halkett and the  
 “ said earl to subscribe a tack of the said coals and  
 “ ironstone, by which tack the said earl and his fore-  
 “ saids are specially to be bound, within two years from  
 “ this date, to put the level passing through the point  
 “ to the south of the office-houses of Pitfirrane, and so  
 “ far as at present open, into good order, and to keep it  
 “ constantly in the same condition, by clearing, building,  
 “ and covering it, so that the surface of the ground may  
 “ be all clear.”

On the same day a tack was executed, by which, inter alia, Sir Charles let to Lord Elgin “ the exclusive right  
 “ to waggonway-leave through the lands before de-  
 “ scribed, and through the lands excepted from this tack,  
 “ and to the levels necessary for working the said coals,  
 “ so far as in his lands or belonging to him.” The term of entry was declared to be Martinmas 1821, at which time the lease of the Pitfirrane coal, originally granted to Caddell and Co., and assigned to Lord Elgin, expired. Lord Elgin having in the meanwhile, viz. in the year 1813, and subsequently, proceeded to extend the Pitfirrane Level, so as to carry it through the coal situated in his own lands of Clune and others, which lay interjected between Pitfirrane and Urquhart on the one hand, and that of Balmule on the other, a dispute arose between him and Sir Charles Halkett as to the right of his lordship

to close, and thereby take advantage of the level for the purpose of draining the coal situated within his own lands.

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.

16th Apr. 1835.

To have this matter settled, another deed of agreement and submission was executed on the 10th of November 1818, proceeding (after a recital of the previous deeds) on this narrative: “Considering that under the authority of the lease first above recited (1768-9) the said level called the Pitfirrane Level was driven into the lands of Urquhart, now belonging to James Hunt Esq., of Pittencrieff, and that the said earl, having right under the several leases acquired by him as aforesaid to the coal within and under the lands of Pitfirrane and Urquhart, and others aforesaid, and being also proprietor of extensive fields of coal lying to the north of Pitfirrane and Urquhart, it was an object of importance to him, in the foresaid transaction with the said Sir Charles Halkett, to obtain a communication of the said level called the Pitfirrane Level to his said coal lying to the north of the said lands of Pitfirrane and Urquhart; and accordingly it was understood by the said earl that by virtue of the powers conferred by the lease first above recited Sir Charles should communicate the said level to the said earl for that purpose; and accordingly, upon the understanding and in the belief that the lease last above recited (1815) conferred the necessary powers for that purpose upon the said earl, the said level was driven forward by the said earl, from the point in the lands of Urquhart to which it had already been carried till it entered his own coal field to the north of these lands: But the said Sir Charles Halkett having a different understanding as to the communi-



“ arbiters hereby specially appointed by the said parties, E. of ELGIN  
 “ or, in case of the said arbiters differing in opinion, any Sir C. HALKETT  
 “ oversman to be named by the said arbiters, shall ad- Bart.  
 “ judge to be a fair and adequate consideration due by 16th Apr. 1835.  
 “ the said earl and his foresaids to the said Sir Charles  
 “ Halkett and his foresaids, for the benefit of the fore-  
 “ said communication of the Pitfirrane Level to the said  
 “ earl’s coal fields before mentioned; and the said  
 “ parties hereby oblige themselves and their foresaids to  
 “ implement and perform to each other whatever de-  
 “ creet-arbitral shall be pronounced on or before the  
 “ day of by the said arbiters and oversman  
 “ in the premises : It being understood, and hereby ex-  
 “ pressly declared, that the said Sir Charles Halkett and  
 “ his foresaids shall be accountable to the said James  
 “ Hunt, Esq., proprietor of the said lands of Ur-  
 “ quhart, as standing in place of the said Dame Agnes  
 “ Murray Kinnynmond, for one third part of the price  
 “ to be received by the said Sir Charles Halkett or his  
 “ foresaids for the foresaid communication, in terms of  
 “ the lease first before recited. And also declaring,  
 “ that all right to the said level, competent to the said  
 “ earl or his foresaids in virtue of the lease granted by  
 “ the said Sir Charles Halkett to him before recited  
 “ (i. e. the lease of 1815), shall remain entire to the  
 “ said earl and his foresaids, without any farther com-  
 “ pensation therefor than is stipulated by the said last-  
 “ recited lease, and that the said right shall not be  
 “ in any manner affected by this present agreement.”

The arbiters accepted, but having omitted at the end  
 of a year to write out a prorogation of the submission,  
 Lord Elgin maintained that it had thereby come to an  
 end, and he declined to renew it.

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 ———  
 16th Apr. 1835.

Sir Charles therefore, in the month of October 1822, raised an action against his lordship before the Court of Session, founding on the deed of agreement and submission of the 10th of November 1818, and concluding that it should be found and declared, “that the  
 “ said Thomas Earl of Elgin and Kincardine, or  
 “ his heirs, successors, or assignees, have no right  
 “ under the foresaid tack executed between him and the  
 “ pursuer, of date the 23d March 1815, to use the Pit-  
 “ firrane Level, except for working the coals thereby  
 “ let; and that the said Thomas Earl of Elgin and  
 “ Kincardine’s right and title to communicate the said  
 “ level to his fields of coal lying to the north of the  
 “ lands of Pitfirrane and Urquhart is constituted solely  
 “ by the before-recited agreement entered into between  
 “ him and the pursuer, of date the 10th November,  
 “ 1818 : And the same being so found and declared,  
 “ the said Thomas Earl of Elgin and Kincardine  
 “ ought and should be decerned and ordained, by de-  
 “ cree of our said Lords, to make payment to the pur-  
 “ suer of the sum of 10,000*l.* sterling, or such other sum  
 “ as our said Lords shall find to be the true worth and  
 “ value of the communication of the said level to the  
 “ said coal fields lying to the north of the said lands of  
 “ Pitfirrane and Urquhart, with the interest of the said  
 “ sum from the date when the said communication was  
 “ begun to be made.”

In defence Lord Elgin pleaded, that by the agreement entered into in November 1809 it was the meaning and intention of the parties that the use of the Pitfirrane Level should be communicated to him, not only for working the Balmule coal, and all the other coal mentioned in the agreement, but also for the benefit of his



own coal fields in the passage of the level onwards to Balmule through those fields.

Lord Mackenzie, on the 27th of November 1823, pronounced this interlocutor:—" Finds it not denied by  
 " the pursuer that the contract and lease between the  
 " parties imply that the defender shall have right to  
 " communicate the Pitfirrane Level to the coal and  
 " ironstone of Bulmule, by carrying it through the  
 " minerals of the defender's own lands: Finds that the  
 " said contract and lease contain no stipulation that the  
 " defender shall keep out the water of his own minerals  
 " from this level so to be carried into them, and that  
 " no evidence is produced or offered to show that this  
 " was understood between the parties; on the contrary,  
 " finds that the exclusive right to the levels necessary  
 " for working the coal and ironstone of Pitfirrane and  
 " Balmule, so far as the pursuer's lands, which includes  
 " the Pitfirrane Level (so far as in the pursuer's lands),  
 " is let to the defender, which appears inconsistent with  
 " the pursuer's retaining, after the date of the lease or  
 " contract, power to sell to the defender, for a price,  
 " any right in the Pitfirrane Level which should operate  
 " during the term of the lease; and, further, finds  
 " strong evidence produced to show that it was actually  
 " the understanding of parties, as well as of their  
 " referees, that the water of the defender's minerals  
 " was to be admitted into the Pitfirrane Level, at least  
 " during the existence of the lease, and consequently  
 " that the pursuer has already received, under the  
 " award of the referees, a valuable consideration for  
 " such admission. For these reasons, and upon the  
 " whole, finds that the pursuer has no right to demand  
 " any further consideration from the defender for grant-

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 ———  
 16th Apr. 1835.

**E. of ELGIN**  
v.  
**Sir C. HALKETT**  
**Bart.**  

---

**16th Apr. 1835.**

ing right to the defender to communicate the Pitfirrane Level to the minerals of the defender's lands during the terms of the lease, and to this extent assoilzies the defender, and decerns : And before proceeding further, ordains the pursuer to put in a minute, stating whether, under this action, and at present, he insists against the defender for a consideration for granting to the defender, by the contract of 1818, right to continue the communication of that level to the defender's minerals after the lease shall have terminated, and if he does so insist, to specify the amount of such consideration." Sir Charles Halkett having reclaimed, the Court, on the 10th of June 1825, recal the interlocutor of the Lord Ordinary complained of, and find that the pursuer, Sir Charles Halkett, has right to a compensation from the defender for the use of the Pitfirrane Level, for any coal not contained in the agreement and tack between the parties ; but find that the defender is not liable to the pursuer in any compensation for the communication of the said Pitfirrane Level to the coal field of Balmule : And, with these findings, remit the case to the Lord Ordinary, with instructions to remit, before answer, to Messrs. Robert Bald and Robert Beaumont, the persons named in the agreement of the 10th of November 1818, to ascertain and report to his lordship the true worth and value of the communication of the Pitfirrane and Urquhart Level to any coal fields belonging to or leased by the defender, not contained in the said tack by the pursuer to the defender, the said report to be put in to the Lord Ordinary on or before the first box-day in the ensuing vacation : Also remit to the Lord Ordinary to

“ find the respondent liable in the expenses of process  
 “ hitherto incurred.” And on a petition by Lord Elgin,  
 with answers, they adhered on the 16th of December  
 1826.<sup>1</sup>

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 ———  
 16th Apr. 1835.

On the case returning to the Lord Ordinary, he  
 decerned against Sir Charles for the previous expenses  
 of process, and at the same time remitted “ to Messrs.  
 “ Robert Bald and Robert Beaumont, the arbiters named  
 “ in the agreement of the 10th of November 1818, to  
 “ ascertain and report on the true value of the commu-  
 “ nication of the Pitfirrane and Urquhart Level belong-  
 “ ing to or leased by the defender not contained in the  
 “ tack by the pursuer to the defender.”

Mr. Beaumont being unable to accept of this remit,  
 the parties agreed that Mr. John Williamson should  
 be substituted for him, and he and Mr. Bald accordingly  
 made an examination, but not being able to concur in  
 one, they presented two separate reports. Mr. Bald  
 estimated the value of the benefit derived by Lord Elgin  
 from the communication of the Pitfirrane Level to his  
 coal at 2,800*l.*; while Mr. Williamson was of opinion  
 that it was worth nothing. Mr. Williamson arrived at  
 this result, on the ground that as Lord Elgin had right  
 to the Urquhart Level it afforded him facilities in  
 draining his own coal, and that when taken into consi-  
 deration along with the fortuitous or necessary drainage  
 arising from the nature of the strata, Lord Elgin was  
 altogether independent of the Pitfirrane Level.

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<sup>1</sup> See 5 S. & D. No. 96, p. 140 (new edition), p. 154 (old edition). In  
 reference to a question as to the competency of remitting to Messrs. Bald  
 and Beaumont, the referees or arbiters mentioned in the deed libelled on,  
 the report bears that the Court “ thought that the reference forming part  
 “ of the agreement did not fall by the omission to prorogate it, but might  
 “ still afford the means of ascertaining the amount to be paid.”

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 —  
 16th Apr. 1835.

On advising these reports Lord Mackenzie, on the 19th of February 1828, issued the following interlocutor and note :—“ Finds, that, in estimating the value of the  
 “ communication of the Pitfirrane and Urquhart Level  
 “ to the coal fields mentioned in the interlocutor of the  
 “ Lord Ordinary dated the 3d February 1827, it does  
 “ not seem proper to take into consideration the chance  
 “ of that coal being freed of water by fortuitous drain-  
 “ age without that communication, but finds, per contra,  
 “ that it is proper to take into consideration the faci-  
 “ lities which the existence of the Urquhart Level  
 “ afforded to the defender to drain said coal indepen-  
 “ dently of the said communication, and remits of new  
 “ to Messrs. Bald and Williamson, to report in this  
 “ view, in terms of the former remit.”

“ Note.—What is to be estimated is, not what the  
 “ pursuer has lost, but what the defender has gained by  
 “ the communication. Now, in estimating that, though the  
 “ Lord Ordinary thinks the opinion of Mr. Williamson  
 “ as to fortuitous drainage too conjectural, yet he does  
 “ not see how the existence of the Urquhart Level can  
 “ possibly be laid out of view. Suppose the Urquhart  
 “ level had been equally deep, and that the sole advan-  
 “ tage of the communication with the Pitfirrane Level  
 “ had been that it could be made for 100% less than a  
 “ communication with the Urquhart Level, could that  
 “ circumstance have been overlooked, and the value  
 “ of the communication with the Pitfirrane Level esti-  
 “ mated as if there was no other alternative for get-  
 “ ting rid of the water but by steam-engine? The Lord  
 “ Ordinary cannot adopt that view.”

Against this interlocutor Lord Elgin reclaimed, praying that it might be altered in so far as it found that it does

not seem proper to take into consideration the chance of Lord Elgin's coal being freed of water by fortuitous drainage without the Pitfirrane Level. The Court on the 29th of May 1829 pronounced this judgment:—"Recal the  
 "interlocutor of the Lord Ordinary, in so far as com-  
 "plained of; remit to his lordship to remit of new to  
 "Messrs. Bald and Williamson, to report on the true  
 "worth and value of the communication of the Pitfir-  
 "rane and Urquhart Level to the Clune and Balridge  
 "coal fields, and other coal fields belonging to the de-  
 "fender, taking into consideration, not only the facilities,  
 "if any, which the existence of the Urquhart Level  
 "afforded to the defender to drain said coal fields, in-  
 "dependently of the said communication, but likewise  
 "what would have been the natural and necessary effect  
 "of the strata in the Clune, Balridge, or other coal  
 "fields belonging to the defender, upon the drainage of  
 "these coal fields into the Pitfirrane Level, indepen-  
 "dently of any direct and artificial communication with  
 "that level, and generally taking into consideration  
 "every circumstance affecting the amount of advantage  
 "gained to the defender by the direct communication  
 "in question; and, in the event of any difference of  
 "opinion between the two reporters, to remit to any  
 "third person of skill, to be mutually chosen by the  
 "said Messrs. Bald and Williamson, to report on the  
 "points of difference that may have arisen in their  
 "opinions; it being understood that, in terms of the  
 "remit of February 3, 1827, the whole shall be before  
 "answer on any of the matters not already fixed by  
 "final interlocutors of the Court."

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 —  
 16th Apr. 1835.

These gentlemen being unable to agree, again made separate reports, adhering to those which they had pre-

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 ———  
 16th Apr. 1835.

viously presented, and they suggested Mr. George Taylor as a fit person to report on the points of difference that had arisen between them. Mr. Taylor accordingly made a report, in which he stated that he concurred generally in the opinions of Mr. Williamson, and not in those of Mr. Bald; and he submitted, that 28*l.* 7*s.* 6*d.* was a sufficient compensation for the benefit of the communication, and that 100*l.* should be awarded in respect of coal below the Pitfirrane Level.

This report having been objected to by Sir Charles Halkett, the Lord Ordinary again remitted to Mr. Taylor to report “whether or not he thinks the value of  
 “ the communication ought to be greater or less than  
 “ he has at present reported.” Sir Charles reclaimed, praying the Court “to remit the case to the Jury Court  
 “ Roll, in order to have the facts, in so far as still con-  
 “ troverted, as well as the just worth and value of the  
 “ Pitfirrane Level to the defender, under the agreement  
 “ of the 10th of November 1818, finally ascertained by  
 “ the verdict of a jury.” The Court on the 9th of February 1831 refused the note.<sup>1</sup>

Mr. Taylor thereupon made a new report, stating the value of the communication of the Pitfirrane Level to be 129*l.* 7*s.* 6*d.*, subject to an addition dependent on the view which might be taken of the saving to Lord Elgin by his thereby being relieved of the necessity of clearing out and rendering available the Urquhart Level, which Mr. Taylor reported would, by an expenditure which he estimated at 425*l.*, answer the purpose of draining Lord Elgin’s coal, though not so efficiently as the Pitfirrane Level. He proposed to charge Lord Elgin with the one half of this sum, being 212*l.* 10*s.*,

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<sup>1</sup> 9 S. & D, p. 412.

in respect that Mr. Hunt (who was now proprietor of the estate of Urquhart) was liable in the other half; and he suggested that if it should turn out that three other parties who were alleged to be under a liability to relieve his lordship of three fourth parts of his half should be found to be so, the benefit derived by him, in availing himself of the Pitfirrane Level in place of the Urquhart Level, would amount to 53*l.* 2*s.* 6*d.* Even this he only considered to afford a proper ground for increasing the compensation, on the supposition that Lord Elgin was, prior to the agreement of 1818, bound to have cleared the Pitfirrane Level. If he was not so bound, then the expense of clearing it (which he had done) greatly exceeded what would have been required to clear the Urquhart Level. If, on the other hand, he was so bound, then the advantage gained by the communication was of the value of the above sum of 53*l.* 2*s.* 6*d.* He farther adhered to his former report as to the 100*l.*

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.  
—  
16th Apr. 1835.

The Lord Ordinary on the 8th of February 1832 pronounced this interlocutor, to which he adhered on a representation :— “ Finds, in reference to the said report, “ that the Earl of Elgin was under an obligation to “ clear the Pitfirrane Level, and, with this finding, “ approves of the said report, and appoints the cause “ to be enrolled, with a view to further procedure.” “ Note.—The Lord Ordinary certainly does not mean “ to find that the Earl of Elgin is bound under the “ lease for 999 years to keep the Pitfirrane Level clear. “ He looks to the prior leases as affording the answer “ to the question of the reporter. Under these, the “ earl having been bound, in 1818, to clear the Pitfir- “ rane Level, though in fact he may not yet have im-

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.  
—  
16th Apr. 1835.

“plemented that obligation, yet (he) cannot on that  
“account state himself as entitled to a deduction from  
“the value of the communication of that level acquired  
“under the contract of 1818, on the ground that it was  
“communicated to him as an uncleared level.” His  
lordship, by a separate interlocutor, on the 22d of  
May, found “that the defender does not appear to be  
“liable for more than one fourth share of the expense  
“of clearing the Urquhart Level, and that he does  
“appear to have a right to call upon other proprietors  
“to pay three fourth parts of that expense, unless they  
“are willing to renounce interest in that level, which  
“it is not stated they are willing to do ; therefore finds  
“that the sum of 53*l.* 2*s.* 6*d.*, not 210*l.* 10*s.*, is the sum  
“to be assumed as the expense to the defender of the  
“repair of that level : Finds no expenses due to either  
“party.” “Note.—The Lord Ordinary does not see  
“how these other proprietors can possibly hold shares of  
“interest in this level without bearing a share of the  
“expense of keeping it in repair, or how, if liable at  
“all, they can be liable otherwise than in the way  
“settled by formal agreements, which are not said to be  
“recalled.”

Both parties reclaimed, and on the 12th of December 1832 the Court pronounced this judgment<sup>1</sup>:  
—“Adhere to the said interlocutor of the 8th of February last, and of the 22d of May upon the said  
“representation and answers, and in so far refuse the  
“desire of the defender’s note: Recal the said interlocutor of the Lord Ordinary of 22d May reclaimed  
“against by the pursuer, and also by the defenders in so  
“far as regards expenses : Finds that the defenders are

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<sup>1</sup> 11 S., D., & B., p. 203.



“ liable to the pursuer in the sum of 129*l.* 7*s.* 6*d.* as E. of ELGIN  
 “ the consideration to be paid by them to him for the <sup>v.</sup> Sir C. HALKETT  
 “ communication of the Pitfirrane Level for working Bart.  
 “ the coal fields in Clune and Balridge, and also find 16th Apr. 1835.  
 “ the defenders liable to the pursuer in the sum of  
 “ 212*l.* 10*s.*, as the half of the estimated expense of  
 “ clearing the Urquhart Level, which has been saved  
 “ to the defenders by their not having occasion to clear  
 “ any part of that level, all in terms of Mr. Taylor’s  
 “ reports, and decern accordingly: Reserving to the  
 “ defenders their claims of relief against the other pro-  
 “ prietors who are alleged by them to be jointly liable  
 “ for the expense of clearing the Urquhart Level, and  
 “ recourse, if need be, against all others interested for  
 “ any part of the hypothetical compensation of 210*l.* 10*s.*  
 “ above decerned for, and to such proprietors and others  
 “ their respective defences as accords; and, with these  
 “ findings, remit to the Lord Ordinary to dispose of the  
 “ cause quoad ultra: Reserving to the pursuer his claim  
 “ for compensation for the communication of the Pitfir-  
 “ rane Level to the coal in the farms of East and West  
 “ Drumtohill and others enumerated in Mr. Taylor’s  
 “ second report, consisting of 675 acres 18 falls, when  
 “ the level shall be carried forward thereto, and to the  
 “ defenders their defences as accords.”

A question then arose, as to interest, before the Lord Ordinary, who, on the 8th of February 1833, found  
 “ the defenders liable to the pursuer in legal interest  
 “ on the sums found due to him from the 11th day of  
 “ October 1822 until payment;” and the Court ad-  
 hered on the 2d of March thereafter.<sup>1</sup>

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<sup>1</sup> 11 S., D., & B., p. 315.

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.

—  
16th Apr. 1835.

Both Lord Elgin and Sir Charles Halkett appealed.

*Appellant* (Lord Elgin).—1. According to a just construction of the deed of agreement made in 1809, and the relative lease, he acquired the exclusive right to the level necessary for working the coal, situated, not only within Pitfirrane and Balmule, but also within his own lands of Clune and others, which lay interjected between these two estates. At this time the Pitfirrane coal was almost exhausted, and the level was only valuable as a means of carrying off the water of the higher coal fields. But these fields belonged to the appellant himself, and the circumstance of acquiring right to the Balmule coal, situated still farther to the north than the coal in his own lands, clearly indicated that it was the intention of the parties that he should enjoy the benefit to be derived to his own coal field by carrying the level through it onwards to the Balmule coal field. This was obvious, from the terms of the deed itself; but if there was any ambiguity it was removed by the correspondence which, previous to the execution of the deed, had passed between the parties, their friends and agents. To these documents it was competent to refer, in order to clear up any matter which was not perspicuously expressed in the deed. He therefore could not be made liable for any other sum in name of compensation for the benefit of that level, seeing that he had paid the full amount stipulated in the deed of 1809.

2. But supposing that he were so liable, the sum to be awarded ought not to exceed 28*l.* 7*s.* 6*d.*, being the value specified in the first report by Mr. Taylor.

3. Neither ought he to be found liable in interest from the date of the summons, which is the period fixed by the Court below. It ought to be restricted till the date of the final decret. This is not a case where interest is due *ex lege* or *ex facto*, and the sum was not liquidated until the date of that decree. The respondent concluded for the sum of 10,000*l.* as compensation; whereas by the ultimate report of Mr. Taylor the sum due amounts to only about 53*l.* Neither can interest be allowed on the sum of 100*l.* which he has reported should be awarded, in respect it is the supposed value of a prospective or contingent benefit which may never exist.

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.  
—  
16th Apr. 1835.

*Respondent.*—1. It is incompetent to refer to correspondence or other extrinsic documents to show that the object of Lord Elgin, in entering into the agreement of 1809, and obtaining the relative tack, was not to work the coal of the landlord, Sir Charles Halkett, but to work other and different coal. That deed and the tack had reference exclusively to a conveyance of Sir Charles's coal situated in Pitfirrane and Balmule, and it was quite easy to extend the Pitfirrane Level to the Balmule coal field without carrying it through the coal field belonging to the appellant; besides, the term of entry under the tack granted in 1815 was not to be till Martinmas 1821, and yet the appellant's operations for extending the level into his own field were carried on in the years 1813, 1814, and 1815. It is impossible that he can maintain that these operations were warranted by a deed which was not then in existence; he is therefore bound in equity to pay a compensation to the respondent in respect of the benefit which he enjoys from the increased value thus given to his coal field.

2. So far from the appellant having reason to com-

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.

16th Apr. 1835.

plain of the sum awarded by the Court below, the respondent is the party truly aggrieved. It was incompetent, in a question between the appellant and the respondent, to take into consideration any right of relief which the appellant might have against third parties. He ought to have been ordained to have paid the full amount of compensation, leaving him to operate his relief against those who may be liable to him in that relief.

3. As the sum awarded was of the nature of a compensation or price due for the use of a valuable subject enjoyed by the appellant, interest was as much due as in those cases where subjects have been sold for a price, without any formal stipulation as to interest. It has been repeatedly decided that in such cases interest is due<sup>1</sup>; but in the present case interest was awarded only from the date of the summons, although the appellant had been in possession for several years previously.

*Appellant* (Sir Charles Halkett).—1. By the deed of agreement of 1818 the parties referred the matter of compensation to Messrs. Bald and Beaumont, and this being a submission for the purpose of carrying an onerous agreement into effect, the Court below held that the remit must be made to these arbiters, as the persons originally suggested by the parties. Although Mr. Beaumont was unable to execute the duty, yet Mr. Bald, who had been mutually nominated, was so, and he reported that the value of the communication amounted to 2,800*l*. The Court ought to have been regulated in their decision by the report of Mr. Bald; neither ought they, in judging of this question, to have remitted to the

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<sup>1</sup> Wallace, 11 Feb. 1825, 3 S. & D., p. 364 (new edition); p. 525 (old edition). Spiers, 5 June 1827, 5 S. & D., p. 714 (new edition); p. 765 (old edition).

inspectors to take into consideration, “ not only the  
 “ facilities, if any, which the existence of the Urquhart  
 “ Level afforded to the defender to drain said coal fields  
 “ independently of the said communication, but likewise  
 “ what would have been the natural effect of the strata  
 “ in the Clune or other coal fields belonging to the de-  
 “ fender upon the drainage of these coal fields into the  
 “ Pitfirrane Level independently of any direct and arti-  
 “ ficial communication with that level.” These were  
 matters altogether extrinsic.

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 —  
 16th Apr. 1895.

2. As the parties were directly at variance on facts, the court ought, when they came to the resolution to withdraw the matter from Mr. Bald, to have remitted the case for decision to a jury; besides, Mr. Taylor, in his report, did not proceed on the facts which were admitted by Lord Elgin, but made a report on a state of the facts altogether different. It is only in cases where a judicial inspector or valuator makes his report upon admitted facts that a party objecting to his report is precluded from insisting on a remit to a jury. In the present case the report is founded on disputed facts.<sup>1</sup>

3. Under the circumstances of this case, Sir Charles Halkett ought not to have been found liable in any expenses, and those which he has paid ought to be ordered to be repaid.

*Respondent* (Lord Elgin).—1. The submission fell altogether by the omission to prorogate it on the expiration of the year from its date; and although the Court held that it was expedient to remit the matter at issue to Messrs. Bald and Beaumont, they made this remit to them, not as arbiters, but merely as parties to whose

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<sup>1</sup> Duke of Buccleugh, 17 May 1827, 5 S. & D., p. 632 (new edition); p. 977 (old edition).

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.

16th Apr. 1835.

qualifications no objections could be made. The non-acceptance of Mr. Beaumont rendered the substitution of Mr. Williamson necessary; and this was agreed to by Sir Charles Halkett, who therefore cannot insist on the report of Mr. Bald being taken as conclusive; and as the reporters differed it was competent for the court to appoint one or more other valuers, and to direct them as to the legal rights of the parties. As the question here is, not what damage Sir Charles Halkett had sustained, but what benefit Lord Elgin had derived from the level as a means of draining his own coal field, it was competent to take into view all the other advantages which he possessed, either from the porous nature of the strata, or the possession of the Urquhart Level, as means of draining the coal field independent altogether of the Pitfirrane Level.

2. It has been repeatedly decided, that if a party do not object to a remit made to a judicial inspector or valuator to report on the matter at issue, he cannot afterwards insist on a remit to a jury.<sup>1</sup>

3. Expenses were justly awarded against Sir Charles Halkett, and he ought to have been found liable exclusively in the whole costs, as the sums ultimately awarded are greatly below those which he demanded.

LORD BROUGHAM, in the course of the argument, addressing Dr. Lushington, (against whose client his Lordship had indicated an opinion,) stated, that if it would be any convenience to him in his reply to know what the scheme of the decree his Lordship should

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<sup>1</sup> Fraser, 9 March 1824, 2 Shaw's Appeal Cases, p. 37. Dickson v. Monkland Canal Company, 29 June 1825, 1 Wilson & Shaw, p. 636. Rowat v. Whitehead, 17 Nov. 1826, 5 S. & D., p. 18 (new edition); p. 20 (old edition). Hunter, 20 Nov. 1827, 6 S. & D., p. 89.

recommend would be (provided that his present impression continued), he would mention it now, that he might meet it in the detail as well as on the principle: And Dr. Lushington having acquiesced, his Lordship proceeded:—The interlocutor of the 12th December 1832, I think, is the governing interlocutor; and without saying any thing of the leases of 1768 or of 1771, or of 1815 and 1818, or making any declaration upon them, I should affirm that interlocutor, by which the Court “ recal the interlocutor of the Lord “ Ordinary of the 22d of May reclaimed against by the “ pursuer, and also by the defenders in so far as regards “ expenses.” The next point relates to the principle of mutuality, or rather the joint nature of the benefit, which is taken into consideration wholly by Mr. Williamson, and partly by Mr. Taylor, and in a great measure adopted by the Court, and is said to be worth, according to Mr. Taylor’s estimate, 100*l.*; that is prospective, all the rest is retrospective; the 100*l.* is found to be for the prospective benefit. The second branch of this judgment will address itself to the prospective sum reserved by the interlocutor to the pursuer Sir Charles Halkett,—not that it comes within the scope of the 100*l.* for the prospective benefit. I should then find Lord Elgin liable to Sir Charles in the sum, not of 29*l.* 7*s.* 6*d.*, which the Court found upon Mr. Taylor’s principle, but 117*l.* 10*s.*, that is four times the sum of 29*l.* 7*s.* 6*d.*; for this reason, that they have divided the expense to Lord Elgin for the benefit into two, bringing it down from 117*l.* 10*s.* to 58*l.* 15*s.*; then they divided that into two again, bringing it down to 29*l.* 7*s.* 6*d.* There is a difficulty in interfering in respect of the sum of 100*l.*, but not as to this sum of 29*l.* 7*s.* 6*d.* When an arbitrator has stated the grounds on which he awards a certain sum, you have a right to deal with it, if on his

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.  
—  
16th Apr. 1835.

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.

16th Apr. 1835.

own statement there is an error in point of law appearing upon the award; but when the arbitrator gives you the sum without showing an error in law, you are bound by that; and therefore, unless he has enabled you to know the ground, and it appears to be a false ground, you are bound by the sum he has fixed. Now Mr. Taylor, in one part of his report, as it is called, has gone upon the principle of mutual benefit, which is the great question between the parties. Wherever I have found it distinctly shown that he awarded too little upon that principle, namely, that he divided by two, then I multiply by two; I reverse his proceeding, because he has given me a clue whereby to trace the error he has committed. Wherever I can see that he has divided it, as, for instance, in the sum of 29*l.* 7*s.* 6*d.*, (which is in fact a sum divided twice,) in that case I know what to do with it, and I reverse the operation, and give the whole; but with respect to the 100*l.*, he does not distinctly state how he gets at that, which is a prospective sum, but is a lumping sum and a precise sum. It is very true, I may say, that I think he has done the same in this case as in the other; the great probability is that he has done so; I do not see why he should all at once have changed his view. But I cannot be sure of this: I have very carefully looked at the case, and he does not say it in so many words; there is not enough to show he has adopted the principle in that case. If Mr. Taylor was a person of exceedingly accurate understanding,—a person whose reasoning was distinct and logical in all its parts, I should have a very confident belief that he argued upon the prospective matter as he did upon the retrospective; but when I see a person arguing, as it appears to me, upon a plain and manifest blunder, what reason have I to suppose that he might not act right in one



case and wrong in another? It is like arguing with an absurd person, and I have no rule by which to proceed in reasoning upon his finding; it is a blunder of so gross a nature that it would not be much more gross if he said that two and two made fifteen; therefore, I have no clue in such a case to guide me as to what is the ground for his report of 100*l.*; and I incline to think that the first finding will be to give the 100*l.*, as Mr. Taylor recommends, and the Court awarded; then to find the 117*l.* 10*s.* instead of 29*l.* 7*s.* 6*d.* We come next to the other branch,—the consideration to be paid for the communication of the Pitfirrane Level for working the coal fields in Clune and Balridge; I have nothing to say against that.

E. of ELGIN  
v.

Sir C. HALKETT  
Bart.

16th Apr. 1835.

The interlocutor then proceeds, — “ and also find  
“ the defenders liable to the pursuer in the sum of  
“ 212*l.* 10*s.* as the half of the estimated expense of  
“ clearing the Urquhart Level, which has been saved  
“ to the defenders by their not having occasion to clear  
“ any part of that level.” This is wrong if I am right  
in what I have said before. The alteration I propose to  
make is this: in the first place, I alter the sum of 212*l.*  
10*s.* into 425*l.*, that is doubling it; the words “ the  
“ half” must be left out, and then it will stand “ as the  
“ estimated expense of clearing the Urquhart Level;” and  
then I think a further alteration will make it more clear.  
The Court says, “ which has been saved to the defenders  
“ by their not having occasion to clear any part of that  
“ level;” striking out those words I would add these,—  
“ the value of the benefit therefrom derived by the de-  
“ fenders;” then come the words, “ all in terms of  
“ Mr. Taylor’s reports;” of course I leave out the word  
“ all,” and I would say, “ partly in terms of Mr. Tay-  
“ lor’s reports,” “ and decern accordingly.” Then comes

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 —  
 16th Apr. 1835.

the second branch, “ reserving to the defenders their  
 “ claim of relief against the other proprietors, who are  
 “ alleged by them to be jointly liable for the expense of  
 “ clearing the Urquhart Level, and recourse, if need be,  
 “ against all others interested for any part of the hypo-  
 “ thetical compensation of,” then, instead of 212*l.* 10*s.*  
 it must be 425*l.*, “ above decerned for, and to such pro-  
 “ prietors and others their respective defences as accords;  
 “ and, with these findings, remit to the Lord Ordinary  
 “ to dispose of the cause quoad ultra : Reserving to the  
 “ pursuer his claim for compensation for the communi-  
 “ cation of the Pitfirrane Level to the coal in the farm of  
 “ the East and West Drumtohill and others enumerated  
 “ in Mr. Taylor’s second report, consisting of 675 acres  
 “ 18 falls, when the level shall be carried forward  
 “ thereto, and to the defenders their defences as accords.”

There is, as I understand, a great field not yet worked,  
 except about 50 acres, but which is now working out at  
 the rate of 30,000 cubic yards a year; no part of  
 that, I assume, has been calculated for in the 100*l.*  
 already given. (This was stated from the Bar to be so.)

Then I add this, (and I should advise that the parties  
 do all in their power to render it effectual,) “ Remit  
 “ to the Court of Session to proceed further in assessing  
 “ the prospective compensations, with a distinct reserva-  
 “ tion, directing, that in case the defenders shall not  
 “ take the offer which the pursuers shall make, on or  
 “ before the first day of next session, that is, the 12th of  
 “ May, the said prospective compensation shall be ascer-  
 “ tained, upon the principle of assessing the value of  
 “ the level to the defender’s working such part of the  
 “ Clune coal as has been made the subject of compen-  
 “ sation in the 212*l.* 10*s.* above assessed.” Do you under-  
 stand the frame of this proposed decree, Dr. Lushington ?

DR. LUSHINGTON.—The latter part of it I do not know that I do, my Lord.

LORD BROUGHAM. — Nothing can be plainer than this. The Court of Session says, here is so much for what has been already done; there is already 100*l.* prospective, but there is the residue of this benefit, in respect of coal to be got, not yet compensated for; you are to receive a prospective remuneration for that. I feel very desirous to put an end to all litigation; and I say, go back to the Court which has made an incomplete adjudication, and let them at once finish the litigation now, instead of keeping it alive for ever. Then, to avoid an inquiry, I say, if before the 12th of May you make an offer which they accept, there may be, in respect of that, an end of the whole case, and a perfect decerniture in that respect; and let that be confirmed by the Court, so that it may bind your successors and all persons privy. But there is another course to be taken. If you shall not do so, then in that case the Court shall proceed to do it, and shall proceed upon the principle, not of taking Taylor's and Williamson's reasoning about mutuality, but taking the principle on which the Court has proceeded in respect of compensation; this is the course I should propose, if my opinion is not altered, when Dr. Lushington has finished his reply. All this proceeds on the supposition that the Court below is wrong, and that I am right; it is working out the principle, which is the main subject in dispute, whether Taylor and Williamson are right in their principle or not; if they are right in their principle, then I must take the course of affirming the decree of the Court below, and decide against the appellant in the cross appeal. If they are wrong, then I reverse the decree, and decide for the appellant in the cross appeal.

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.

16th Apr. 1835.

**E. of ELGIN**  
**v.**  
**Sir C. HALKETT**  
**Bart.**  
 ———  
 16th Apr. 1835.

The last question is as to costs. If I am right in reversing the cross appeal, then the interlocutor of the 9th of February is wrong, as that gave the expenses to be paid by the appellant in the cross appeal, the respondent in that; I must, therefore, reverse that, and those expenses must be repaid, if they have been paid. That is the only alteration I propose to make as to the question of costs in the Court below; but as to the question of costs here, my impression is, that as this is a case of four or five hundred pounds, and they have been held entitled to full compensation by the Court below, they must have their compensation clear of all expenses; and that it would be a most cruel benefit to give them 400*l.*, deducting 600*l.*; that would not be at all giving them a benefit; and therefore I really consider this is a case in which, independent of any other costs, the costs of the appeal must abide the event of the suit. As to the costs of the cross appeal, we cannot give them on any principle whatever. Now, I have stated to you the whole of my view; and you will proceed with your argument.

At the close of the argument—

**LORD BROUGHAM.**—My Lords, in this case, I shall take the opportunity of reconsidering the arguments urged by the learned counsel for the appellants in reply, particularly with reference to their effect on the matters raised by the cross appeal which have been argued. Undoubtedly, some difficulty arises in respect of that part of the finding of the Court of Session which respected the Urquhart Level, proceeding, as it did, upon the report of Mr. Taylor, and more particularly that part of the finding which excludes all compensation in respect of Balmule. I shall therefore look further into this case, which is in some respects a very complicated

one, and shall endeavour to put the matter into such shape as may prevent recourse to the Court of Session ; I should most strongly recommend to Lord Elgin, if the decision of the Court below should be affirmed, that he should make the other party an offer ; and I should recommend to the other party, that they should endeavour to accept it, in order to prevent the necessity of further litigation. This is on the supposition that the finding of the Court of Session is right,—that will be modified by the supposition that the respondent (the appellant in the cross appeal) shall be found right in his objections to the moieties given, instead of the whole sums referred to in this finding. I ought to state before the parties leave the bar, that a case has been found, in 1716, in which the House did allow the costs of the appellant,—a small sum, 50*l.*, was given to the appellant as the costs of the appeal, in the case of Hamilton against the Officers of the University of Glasgow ; and it is supposed that Lord Loughborough, in a case of great oppression, did something of the same kind.

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.  
—  
16th Apr. 1835.

The case was then adjourned.

LORD BROUGHAM.—My Lords, there are two cases which stand for the judgment of your Lordships : the one of them the case of the Earl of Elgin v. Sir Charles Halkett, a very complicated and difficult case, and a very tedious one, involving the discussion of twelve several interlocutors appealed from by Lord Elgin ; every one of which was appealed from also by the respondent, inasmuch as he conceived the judgment, though generally speaking in his favour, was not sufficiently favourable to him in some of its parts. It is needless for me to enter into the reasons which induce me to recommend to your Lordships the judgment I am about

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.

16th Apr. 1835.

to propose. I stated at the time of the argument the impression which I formerly had, and in which I still abide; that impression has been strengthened by the best consideration I have since been able to give to the case. I stated generally the grounds of the opinion I had then come to, and what appeared to me to be the fit course for your Lordships to take in finally pronouncing this judgment, — a course adapted neither entirely to the views of the one party or the other, and which consequently will have the fate of many decisions made here and elsewhere, — that of not giving entire satisfaction to either party; but which, however much that is to be regretted, probably does not necessarily, on that account, possess less claim to be considered by your Lordships a just judgment. I stated various particulars, in which it appeared to me that an incorrect view had been taken by the surveyors, and particularly Mr. Taylor, who was consulted; that it appeared to me that there had been great oversights committed in material parts of this case, some by one surveyor, and some also by the other; and I stated to your Lordships, in the presence of the counsel on both sides, that I might have the benefit of their discussion, the propositions on which my opinion rested, and also the course I proposed taking to carry into effect that opinion, in order that I might have the benefit, on the one hand, of their discussion of the grounds of decision, and on the other, the benefit of their suggestions on either side, as to the tendency of that particular mode of disposing of the question between the parties, — the tendencies of that mode to effect the object which I had in view, consistently with the principles upon which the opinion I had come to was grounded. I read those

statements in detail; I referred them to the particular interlocutor to which they appeared to me to be most applicable, and upon which the alteration would be most conveniently engrafted, the interlocutor pronounced on the 12th of December 1832, which is the ninth of the interlocutors appealed from in the original appeal, and also the ninth of the interlocutors appealed from in the cross appeal; for the two parties, as far as the ninth, keep up exactly in a line, each appealing against part of the same interlocutor; the difference is, that afterwards one of them does not appeal against the tenth, but he appeals against the eleventh. Having thrown out the opinions I had formed, in order to have the benefit of a full discussion, which I considered better in a complicated case of detail than stating those opinions after the counsel had withdrawn, it would be exceedingly useless to go through all the particulars of these interlocutors. Upon the whole I am of opinion that five per cent. interest should be given from the date of the summons. Without troubling your Lordships with any farther detail as to the alterations, I shall hand them in, and they will be given out to each of the parties; they will see that it is the interlocutor of the 12th of December 1832 which is altered; and all which remains for me is humbly to move your Lordships, before the new order, that these interlocutors, so far as they are appealed against in the original appeal, be affirmed, and that the costs be taxed in the original appeal; and that so far as they are appealed from by the cross appeal, the interlocutors be altered and reversed in the particulars to which I have adverted on a former occasion, and which are contained in the note which shall be handed to the parties.

E. of ELGIN  
v.  
Sir C. HALKETT  
Bart.  
—  
16th Apr. 1835.

E. of ELGIN  
 v.  
 Sir C. HALKETT  
 Bart.  
 16th Apr. 1835.

The House of Lords ordered and adjudged, That the said original appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellants in the said original appeal do pay or cause to be paid to the said respondent the costs incurred in respect of the said original appeal, the amount thereof to be certified by the Clerk Assistant: And it is further ordered, That the interlocutor of the Lords of the Second Division, of the 9th of February 1831, complained of in the said cross appeal, in so far as it finds the defenders entitled to expenses since the date of the interlocutor therein mentioned, and remits to the Lord Ordinary to proceed accordingly, be and the same is hereby reversed: And it is further ordered, That if such expenses have been paid by the pursuer the same shall be repaid to him by the defenders: And in regard to the interlocutor of the said Lords of the Second Division, of the 12th of December 1832, it is declared, That the defenders are liable to the pursuer, as the consideration to be paid by them to him for the communication of the Pitfirrane Level for working the coal fields in Clune and Balridge, in the sum of one hundred and seventeen pounds ten shillings, in addition to the sum of one hundred pounds, making together the sum of two hundred and seventeen pounds ten shillings, instead of the sum of one hundred and twenty-nine pounds seven shillings and sixpence, in the said interlocutor mentioned; and that the defenders are liable to the pursuer in the sum of four hundred and twenty-five pounds, as the full estimated expense of clearing the Urquhart Level, as therein mentioned, instead of the sum of two hundred and twelve pounds ten shillings, in the said interlocutor mentioned, as the half of such expense: And it is further ordered, That the interlocutors complained of in the said cross appeal, in so far as the same are not hereby altered and varied, be and the same are hereby affirmed.

RICHARDSON and CONNELL, — SPOTTISWOODE and  
 ROBERTSON — Solicitors.



[7th May 1835.]

DR. DONALD M'AULAY, Appellant.—*Tinney—Lushington.*

JAMES ADAM and DAVID BROWN, Jun., W. S., Respondents.—*Pemberton—A. M'Niel.*

*Agent and Client.*—Circumstances under which, although the accounts of a law agent, which had been rendered with a view to an extra-judicial settlement, were remodelled when the client required a taxation, and the remodelled accounts contained fictitious charges, (but which had been inserted by a third party employed to remodel them, and were afterwards withdrawn,) and 219*l.* was taxed off 81*l.*, the House of Lords affirmed with variations the judgment of the Court of Session, decerning for the balance with expenses.

*Appeal.*—Question, whether, where no objections are lodged to an auditor's report as to taxation of accounts, and an appeal is entered against the judgment of the Court approving of that report, it be competent to enter on the merits in the House of Lords; and if not so, whether, the only other question being one of costs, an appeal be competent?

THE Respondent, Mr. Adam, acted for several years as agent for the deceased Mr. Donald M'Aulay, and his son, Dr. M'Aulay, the appellant, in various law-suits in which they were concerned. In the year 1828 Mr. Adam entered into partnership with the other respondent, Mr. Brown, which partnership was dissolved in July 1831; and during the three years that it subsisted the business of Messrs. M'Aulay was conducted by Messrs. Adam and Brown.

2D DIVISION.

7th May 1835.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

A state of accounts between them and Dr. M'Aulay, as at 25th March 1830, was rendered to that gentleman, by which it appeared that, after giving credit for the sums paid to account, there was a balance due to Messrs. Adam and Brown at that date of 464*l.* 17*s.* 5*d.*, exclusive of certain accounts previously incurred to Mr. Adam, and due to him as an individual.

Dr. M'Aulay, having been afterwards pressed for a settlement, expressed a desire that the accounts should be submitted to the auditor of Court for taxation, which was acquiesced in by Messrs. Adam and Brown; but as they alleged that the accounts, instead of being overcharged, were stated at a lower rate than they were entitled to have charged, they reserved to themselves the power of stating the charges at the full amount which they were entitled to demand; and they intimated to Dr. M'Aulay that they were sent to a Mr. Robertson to remodel for the auditor, and to fill up the regular fees.

A copy of the accounts as thus remodelled was afterwards sent to Dr. M'Aulay, with a notice that the 16th May 1831 had been fixed for the taxation; but he declined attending on that occasion, on the ground that a much longer notice was requisite to enable him to examine the accounts, and instruct an agent to state objections to them.

The copartnership of Adam and Brown was dissolved on the 11th July 1831, and Mr. Brown (who was empowered to collect the outstanding debts) wrote several letters to Dr. M'Aulay for a settlement, which were not attended to, and he having come to Edinburgh in November following, a summons was executed against

him for the balance claimed as due to Adam and Brown on the accounts as remodelled, as well as for the amount of certain additional accounts which had been incurred subsequent to 25th March 1830. Letters of arrestment, on the dependence of this process, were executed, by which some cattle belonging to Dr. M'Aulay were attached, which led to an arrangement under which he granted two bills, for 200*l.* each, to Adam and Brown, in consideration of which the summons was departed from and the arrestments were loosed; and Dr. M'Aulay gave them a letter, consenting "that the  
 " accounts betwixt Adam and Brown, W. S., and me,  
 " shall be audited under the authority of the Court of  
 " Session." In consequence of this a petition, founding on the act of sederunt, 6th February 1806, was presented to the Second Division of the Court of Session, praying for a remit to the auditor of Court to tax the accounts. These accounts were those which had been remodelled by Robertson. Dr. M'Aulay lodged answers in which, while he admitted his liability generally, he stated  
 " that Robertson, in place of remodelling the ac-  
 " counts, had proceeded to concoct and fabricate a new  
 " account, as large as he could make it, by inventing  
 " and inserting additional fictitious charges, and alter-  
 " ing, remodelling, and constructing documents to cor-  
 " respond to these. The result of the whole was the  
 " accounts now founded on in the petition, which con-  
 " tain charges innumerable, not in the original accounts,—  
 " not actually incurred,—and the mere fruit of invention.  
 " Fees are stated as paid to counsel which never were  
 " paid. Consultations are charged for which never  
 " took place. There are borrowings, and revisings,  
 " and meetings set down, not one of which ever hap-

M'AULAY  
 v.  
 ADAM and  
 BROWN, Jun.  
 —  
 7th May 1835.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1895.

“ pened. There are memorials to counsel and copies  
“ of papers charged, none of which ever were drawn  
“ at the time, and which, if they exist at all, were  
“ drawn ex post facto, by this Mr. Robertson, to bear  
“ out the false charges before the auditor. To the  
“ extent of about 300£ the accounts now charged to  
“ the respondent (including both those of the firm and  
“ Mr. Adam individually) are a mere fiction.” He  
further maintained that he was not liable for certain  
claims, arising, as he alleged, out of the professional  
errors and negligence of Brown and Adam.

In consequence of these allegations the Court made a  
special remit to the auditor “ to report specially on the  
“ different subjects and points in question to the Court  
“ therein,” and granted commission and diligence to  
the parties for citing witnesses and havers, in common  
form.

Thereafter some meetings took place between  
Mr. Brown and the agent for Dr. M'Aulay, with a  
view to an extra-judicial settlement of the accounts;  
and it was stated that upon these occasions the latter  
pointed out to Mr. Brown, not only that many new  
charges had been introduced into the remodelled ac-  
counts which were not in the first set of accounts, but  
that many of these charges were entirely fictitious; and  
that immediately Mr. Brown declared he had never  
seen the remodelled accounts, was entirely ignorant of  
such improper charges having been introduced, of which  
he expressed the strongest disapprobation, and at once  
agreed to strike them off, and to withdraw certain other  
charges, which, although not of the same description,  
were considered objectionable. But he declined to give  
up the charges as to which objections had been made

on the ground of non-liability, mismanagement, &c. He however offered to deduct for the whole account 180*l.*, so as to avoid further expense and litigation, but this was not acceded to.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

A set of accounts, corrected by striking out the charges inserted by Robertson, were then produced to the auditor; but Dr. M'Aulay declined to allow any other than the remodelled accounts referred to in the petition to be received, except on payment of all the previous expenses; which Adam and Brown would not agree to. Various expensive proceedings then took place before the auditor. The total amount of the accounts were 889*l.* 7*s.* 6*d.*, from which he taxed off 219*l.* 2*s.* 3*d.*, leaving a balance due of 670*l.* 5*s.* 3*d.*; and he specially reported that, as the objectionable charges in the remodelled accounts had been withdrawn, it was not necessary for the Court to give any judgment on them; that Dr. M'Aulay had withdrawn some of his objections to articles which he resisted on the ground of non-liability, while Adam and Brown had, without admitting that they were not good claims, given up others, and he explained that some errors had arisen from claims which properly belonged to Mr. Adam as an individual having been inserted in the account of Adam and Brown. No note of objections was lodged to this report; and on advising it the following opinions were delivered:—

The *Lord Justice Clerk* said, “ That the question deserved very serious consideration, inasmuch as it had reference to the characters of the parties who were the petitioners before their lordships. It was clear that, but for the statements in these answers, they never could have made this special remit; because the application just led to this, to examine and hear

MAULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1895.

“ parties, and to take all objections under consideration.  
“ But, owing to special answers, they had here a special  
“ remit, and they required a special report, directing  
“ the attention of the auditor to all points in the case.  
“ It was a most material circumstance, that in these  
“ answers there were the gravest and most serious  
“ charges against the petitioners. They were charges  
“ which amounted to this, that false, fabricated, and fic-  
“ titious accounts were prepared against this client of  
“ theirs by those gentlemen jointly; and it was clear  
“ there was no exception made, for not only were the  
“ accounts of Mr. Adam, but the accounts of the whole  
“ party, objected to, in passages in pages 2d, 3d, and 4th  
“ of the answers; and the most material of them was  
“ in the middle of page 4th, namely, ‘ There are memo-  
“ ‘ rials to counsel and copies of papers charged, none  
“ ‘ of which were ever drawn at the time, and which, if  
“ ‘ they exist at all, were drawn ex post facto, by this  
“ ‘ Mr. Robertson, to bear out the false charges before  
“ ‘ the auditor.’ Was it not, in reference to an answer  
“ that contained such charges, material to attend to  
“ the fact, that objections are competent to every fair  
“ litigant, and which, whether they are sustained or not, do  
“ not affect the character of the party? He may have  
“ deviated from the rules of this Court in making his  
“ charges, and the auditor strikes them out. It never  
“ entered into the mind of any one, that, because there  
“ were objections made and sustained, the character of  
“ the individual whose accounts were so audited was to  
“ be blasted. But it turned out that the objectionable  
“ charges were previously withdrawn, and were declared  
“ to be demands not made on this client. Then they  
“ went to the auditor, who said, that, ‘ although these

“ ‘ are not the accounts that I am called upon to audit  
 “ ‘ by the one party, the other party insist that these  
 “ ‘ are the accounts ;’ — and all this voluminous cor-  
 “ respondence takes place. It turned out, that, in  
 “ order to get the accounts settled, they were brought  
 “ forward in an imperfect shape ; but when it was stated  
 “ that they must be audited, and have the sanction of  
 “ the Court, they were sent to Mr. Robertson to be  
 “ prepared ; but he chose to sit down, and, in order  
 “ to make up for blanks, he proceeded to make other  
 “ memoirs ; and this gentleman seemed to plume him-  
 “ himself in this sort of business. He had clearly mis-  
 “ taken his duty ; and Mr. Brown said, he never heard  
 “ of them ; and Mr. Adam also consented that these  
 “ charges should be thrown aside ; so that there was no  
 “ dispute between them as to Robertson’s charges.  
 “ The objectionable articles were withdrawn before  
 “ these answers were put in, and now the auditor’s re-  
 “ port was before their lordships. The auditor struck  
 “ off a certain sum, but he did not strike off things  
 “ that were of a fictitious nature, or of a false nature ;  
 “ and not only were there no evidence of such charges,  
 “ but no grounds whatever for such statements in the  
 “ answer. He (the Lord Justice Clerk) was there-  
 “ fore bound to say, that persons whose character was  
 “ so affected, and who had vindicated their character,  
 “ were entitled to that which they now asked for, the  
 “ expenses of this discussion.

“ *Lord Meadowbank* said he was of the same  
 opinion.

“ *Lord Glenlee* said, he concurred entirely with their  
 “ Lordships. He had not paid so much attention to  
 “ the question, perhaps, as their lordships, and he was  
 “ struck with the fact that these petitioners were not

M’AULAY  
 v.  
 ADAM and  
 BROWN, Jun.  
 —  
 7th May 1835.

M'AULAY  
 v.  
 ADAM and  
 BROWN, Jun.  
 —  
 7th May 1835.

“ allowed to withdraw the accounts that were made by  
 “ Robertson, when they saw they were improperly pre-  
 “ pared ; and it appeared to him that all the extravagant  
 “ productions before them were occasioned by the absur-  
 “ dity of not allowing the petitioners to correct their  
 “ accounts in the way that they desired.”

The Court then pronounced the following interlocutor —“ Edinburgh, 15th February 1834.—The Lords  
 “ approve of the auditor’s report upon the accounts  
 “ libelled, and in terms thereof decern against the re-  
 “ spondent, in favour of the petitioners, for the sum of  
 “ 670*l.* 5*s.* 3*d.*, the sum reported upon as due, under  
 “ deduction of 304*l.* 13*s.* 8*d.* paid to account, as stated  
 “ in the petition, together with the legal interest on the  
 “ balance from the 17th day of November 1831 and  
 “ till paid ; find expenses due to the petitioners, in-  
 “ cluding the expenses of this discussion, and of the  
 “ procedure before the auditor, &c.”

Dr. M'Aulay appealed, and maintained, 1., that the report of the auditor was not made in compliance with the order of Court, as it omitted to take special notice of the circumstances relative to the remodelling of the accounts, which formed a prominent part of the appellant’s answers to the petition ; 2. that, although the answers had had the effect to cause the respondents to withdraw mere fictitious claims, and although the auditor had struck off 216*l.*, while the respondents had offered to deduct only 180*l.*, yet the Court had subjected the appellant in full costs ; and 3., that credit had not been given to him for 200*l.* for which he had granted bills.

The respondent in answer contended, 1., that as no note of objections was lodged against the report it



was not competent for the appellant in any respect to challenge it; and if so, then, as the merits were excluded, this was an appeal as to costs, which was incompetent; and, 2., that as the charges objected to in the remodelled accounts were withdrawn before any litigation took place, and the appellant had been substantially the losing party, the Court had done correctly in finding him liable in expenses.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

LORD BROUGHAM.—My Lords, although I of late have adopted the practice, in assisting your Lordships in hearing these appeal cases from Scotland as well as this part of the United Kingdom and Ireland, of reducing into writing the grounds of the judgments I recommend your Lordships to pronounce in each case of any importance, I think this is not one that calls upon me to undergo that labour, and put the parties to the necessity of waiting to another day, till judgment is pronounced. At the same time, if, upon further consideration, I should think (upon the construction of the act of sederunt — a matter of some importance in the regulation of professional conduct in the Court below) that it would be fitting that those reasons should be reduced to writing, I shall do so, though, as at present advised, I think it will not be necessary. I shall now shortly state the grounds upon which, although your Lordships might be disposed to reject one or two matters admitted in the Court below, you are precluded from going into the consideration of those matters; and I shall proceed to show the grounds upon which I think the judgment in the Court below, with a slight alteration as regards the sum of 200*l.*, both of principal and

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

interest, ought to stand. The question arises in these circumstances : — Messrs. M'Aulay appear to have employed Messrs. Adam and Brown, writers to the signet, parliament house agents and common law agents in Edinburgh, for a series of years, in a great variety of business, conveyancing as well as litigation, — chiefly, however, litigation ; and an account was rendered by these gentlemen to their clients, in which they held Messrs. M'Aulay liable to them in the amount of four or five hundred pounds. This account was one exceedingly obscure, as it is admitted on all hands ; it was of a confused, and scarcely intelligible, if at all intelligible, nature ; the consequence of which was, that not only persons not professional, but professional men themselves, could not easily find their way through it, or apportion the different items of charge to the different pieces of business stated to be done, in such a way as accurately or at all to be able to ascertain whether those charges were just upon those pieces of business. This objection being naturally taken by Messrs. M'Aulay, the consequence was that Messrs. Adam and Brown agreed to refer the account to some one privately on their part, employed by them, to what they called remodel and arrange it, and make it more easy to be understood, and consequently more fair towards the parties who were chargeable. That this was a very fit course to take no person can deny ; but then it was fit, in my humble opinion, only thus far forth, that the person — the accountant — to whom it was sent to be what was called remodelled, or rather classified and arranged, should confine himself to such process of classifying and arranging, so as to make that easy of comprehension

which before was hardly comprehensible at all. It is one security that a party has who runs up a bill with any man employed by him, whether as a tradesman or a professional agent, and who allows that account to run on from year to year, and to combine a great variety of items, that the books of the person charging him for those items—that the accounts kept regularly from day to day of the business done by the professional person, or of the goods supplied by the tradesman, should, in the first instance, speak for him, and for themselves, and tell a tale against the customer, or against the client, with the kind of authenticity, and therefore proportional degree of credit derived from contemporary entries in books of account; consequently, whoever makes out a bill against a client or against a customer, ought, as near as may be, to follow the entries in the order of time, and in the specification of the items in the account. If a confused statement is made in the first instance, and if the account books will not help those persons so charging and so making out the confused statement to clear it, then it becomes a very delicate matter indeed to do any thing but merely new arrange, with explanations, the entries in those books, or upon those separate sheets of paper, if they have been so kept; but it is by no means a proceeding to be countenanced in any court of justice, or by any man of business, with any kind of approbation, that any thing further should be done in the way of making the account clearer, than simply explaining, apportioning, classifying, and, as it were, altering the arrangement of the items. If you go beyond that, you take away the credit and the kind of authenticity derived from such books or sheets of paper, if kept in separate

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

memoranda, and you take away, by so much, the kind of security that the client or the customer derives from that source. I therefore cannot say that I approve of any thing called remodelling, unless it is confined, as I have described the process ought to be confined, to arrangement and explanation. With that remark, I now resume the statement, and proceed to add, that after Messrs. M'Aulay had taken the objection, and Messrs. Adam and Brown had so far yielded to it as to say it should be referred to a person to remodel the account, they did so appoint James Robertson to that office, who took it upon him, and from whose proceedings in discharge of that duty has mainly arisen this litigation. I ought to add, that at the time the objection was taken to the account by Messrs. M'Aulay, Messrs. Adam and Brown said, we have charged you below, or they gave him to understand that they had charged him below the amount they were, strictly speaking, entitled to; and if it was made a matter of contentious discussion, they then might raise the charge to the usual level. Accordingly, when they appointed Mr. Robertson to perform the operation of remodelling, they desired him to take that into consideration, and see if any thing could be added. Now, as I have made one observation with reference to the remodelling entrusted to Mr. Robertson, so I will make another here. I by no means intend to assert that a person who has made one charge against his debtor, and limited himself to that amount, may not honestly and correctly enough, if that charge is refused to be paid, and the justice of it disputed, say, If you dispute it I will charge what I have a right to do; I have not gone to the extent of my right, but I will go

to the extent of it if you defend yourself upon your right. — Nevertheless it is not, generally speaking, the ordinary, or, generally speaking, a creditable mode of proceeding. Is it fair, because a party refuses payment of an account delivered, to say, All I have done hitherto means nothing; — all I have given you in as my demand shall go for nothing, I will ask you a great deal more, and more than double? It is not a very common mode of proceeding, and if the first bill came before a jury in the course of a contest, I do not think there is any reason which could suffice to convince the jury that the first was not the proper amount of charge, unless, from circumstances which I can hardly figure to myself, the person had been kept from going in the first instance to the full extent of his claim. But however, it is perfectly clear that the solicitors here did give notice to their clients; for they said, We shall charge you to the full extent if you dispute it. Accordingly, Mr. Robertson, so authorized, proceeded with the office; and, in looking out for charges, he obeys the instruction to the letter, and even more than to the letter; for the success that attended his exertions was such as, apparently from one expression in the correspondence, to have surprised his employers. He raised the demand against Messrs. M'Aulay about 160*l.*, for business done since the account was rendered, and he raises it 300*l.* upon the whole, for that not brought in before, making the account between 900*l.* and 1,000*l.*, which had been between 400*l.* and 500*l.*; part of that was for business newly done, and another part was offered to be departed from to the pursuer by the present respondent. This at first was disputed, not unnaturally, and still more vehemently disputed

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

afterwards by Messrs. M'Aulay; and then began the first contentions between the parties, and the litigation which has ended in bringing the whole case before your Lordships. It is material to observe, that the first application made to the Court by the respondents here — the petitioners below — was, in the usual way, to have their bill taxed,—to have the account of the expenses against their client remitted to the auditor of the Court; and it is material, for the course that the case has taken, to attend to the first part of the proceeding, which is the point from which the whole litigation springs. It was presented and served by the order of the Court, in November 1831, upon the other party, in the usual form; that was then the ground of the order, being the first interlocutor appealed from. The order of the Court of Session is in the usual form,—to remit the petitioner's account, annexed to his petition, to the auditor of the Court, and the parties to attend the taxing upon that order. There had been an attendance upon the auditor, and a report by that officer, and that report had found Messrs. M'Aulay liable in a large sum. It appeared that Messrs. M'Aulay, upon the report coming for confirmation by the interlocutor of the Court, had not taken their objection to the report in writing, shortly stating the reasons of their objection, as it is clear they must; and without that it is not denied on the other side of the bar that no further proceeding could have been had; for, by the act of sederunt, that order and deliverance of the Court so made, without any written objection to the auditor's report, must be final: that is admitted. But then, after the first remit to the auditor, answers are put in by Messrs. M'Aulay to the petition, and upon

those answers the Court made an interlocutor, which gives rise to the only doubt that continues to encumber the question. They set forth several items, amounting to five, for which they say, there is no ground, and gave the reasons; and they set forth the conduct of Mr. Robertson, in respect of the bills now delivered in by Messrs. Adam and Brown to them, as amounting to a gross fraud, to the fabrication of imaginary and fictitious items, and to the still more elaborate machinery of fraud, which consists in actually fabricating papers as having been written by Adam and Brown for the instruction of counsel in causes long since at an end; and in which causes no such papers had ever been written by them, or either of them, or written by any person at all, for the instruction of any counsel at all. This is a direct charge of fabrication, the most elaborate, and of the most discreditable nature on the part of Robertson; and though the answer does not bring the participation in the fraud as a charge against Adam and Brown, yet, for the reason I threw out during the argument, no doubt they are charged with it by implication; for after having stated in the most comprehensive terms the corpus delicti of Robertson, Adam and Brown are stated to have employed Robertson, and to have used the accounts so fabricated by him; and lest any doubt should remain that this was to let in an insinuation, though not a charge in distinct terms, Adam and Brown are said in distinct terms to have made an offer to Messrs. M'Aulay, after using the accounts, and in order to stifle further inquiry. I look upon this answer as raising the charge of fabrication against Adam and Brown, and charging, by something more than impli-

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

cation, a participation ; and that groundless charge may prove not immaterial to the question which has arisen touching the expenses of these proceedings. Answers to this purport having been given in, another and a second interlocutor was pronounced by the Court on the 8th of March 1832, of a peculiar nature ; not the ordinary and usual remit, (that remit had been given before, and that remit was now ripe to be acted upon,) but it was an additional order, upon circumstances emerging out of the first remit, and as adding something to the inquiry which the first order charged the auditor to make : I say, adding something to the inquiry, and I say so advisedly ; because, from all I can see of these proceedings, either as far as is stated or upon the face of the interlocutor of March 1832 which I am about to read, or upon the face of the report of the auditor which I am about to read, I conceive that the auditor has omitted to mention the earlier order, which was an order of course, and has mentioned only the second order which has given him additional instructions. He ought to have stated both these orders, as he has proceeded upon them ; and that is very material. The second order is not a direction to tax ; and if the second order had stood alone, the auditor would have had no right to tax. It is this : “ The Lords having  
“ resumed consideration of this petition, with the an-  
“ swers thereto, and heard counsel for the parties,  
“ appoint them to be heard before the auditor ;” that is, to hear — it gives him the power to hear ; — “ grant  
“ commission to him for this purpose,” that is, to hear ;  
“ and instruct him to report specially on the different  
“ subjects on the points in question to the Court  
“ therein, and grant commission and diligence to the



“ parties for citing witnesses and havers in common  
 “ form.” There is not a word here about taxing ; he  
 has no right, by force of this order, to tax ; it only  
 authorizes him and commissions him to hear the parties,  
 and report specially upon the different subjects and points  
 in question. Nevertheless the auditor has, by his report,  
 gone through the whole taxation, taxed the bill from  
 beginning to end, and taxed off 219*l.* therefrom.  
 He proceeded to do that regularly, independently of  
 this order of the 8th of March 1832, by the order of  
 the preceding month of December 1831 ; for observe,  
 as that order stood, it was not interfered with, much  
 less annihilated by the order of the 8th of March fol-  
 lowing ; that order therefore was in existence and in  
 full force ; it had not ceased to exist by any rescinding  
 process of the Court, or by efflux of time, or by any  
 alteration of circumstances or parties. Certainly, there-  
 fore, that order stood with the second ; and then I ask  
 your Lordships in what situation the auditor found  
 himself ? He found himself acting under the exigency  
 of two orders, — a direction to tax, and to report  
 special circumstances ; he was bound to follow both  
 those orders, and to execute them. He did proceed ;  
 and then one party says, he did not comply with the  
 second because he did not follow the instruction to  
 report specially upon the different subjects and points  
 in question therein (and by “ therein ” I apprehend  
 they mean, in order to support their argument at all,  
 “ in the petition and answers ” ) ; and this desires him  
 to report specially, instead of making the taxation  
 generally. Whether it be so or not, I shall not stop  
 to inquire, but proceed to finish the narrative of  
 the facts. I say he did not report specially, but re-

M'AULAY  
 v.  
 ADAM and  
 BROWN, Jun.  
 —  
 7th May 1835.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

ported by taxing off 219*l.* from the account that had been sent in ; that, in the meantime, a great many items were abandoned is admitted ; that they were never before the taxing officer seems not to be disputed ; and at length the question came before the Court upon the auditor's report and taxation. Now, why did not the appellants, Messrs. M'Aulay, take that objection before the Court below, which is not mainly but solely relied upon before your Lordships ; to wit, not that items were allowed which ought not to have been,—not that the sum of 219*l.* was too small, and ought to have been larger,—but that the auditor had not complied with the instruction given by the second order, inasmuch as he had not reported on the special circumstances of the case, which is construed by the appellant to mean the fraud and fabrication imputed to Robertson directly, and less directly to Adam and Brown ? Why, I ask, did they not then and there take that objection ? Why have they reserved it for this last stage, in this last resort ? If they had then and there made the objection, and grounded upon it an application to send back the matter ;—not to remit in their favour upon the matter of the taxation, but to remit to the auditor, in respect of his not having performed what the Court desired him to perform,—if they had done that, and been well grounded in their application, the Court could conveniently and would immediately have sent it back, if they thought a case was made out for doing it, to the auditor to make a more full and explicit report. No such thing was done by the appellants ; they did not say a word upon the subject ; they confined themselves to the question of expenses alone. However material the omission in the report, (and I do not deny that the

fabrication of the accounts was the evil at that time pressing sorely upon them in their application to the Court,) they never think of making any such objection. Can there be a doubt why? They were perfectly aware that they could not make such an objection; they were perfectly aware that the auditor had been very strictly called upon to perform a certain duty by the second remit; and they were aware that the items relating to the vouchers fabricated had been abandoned long ago; and I am bound to say, in justice to Messrs. Adam and Brown, that they never persisted in them at all after they discovered what Robertson had been about. I do not see any reason to suppose that they had ever persisted before the auditor in making any one demand in respect of those items. The omission to say any thing about fabrications was an omission that, it is true, pressed sorely upon the appellants here; but it was an omission that pressed rather more sorely against Messrs. Adam and Brown, whose conduct, as I have a right to say, was most injuriously impeached by the other party. It is rather they than the other party who, by what letters we have upon the subject, and what took place, appear to have complained of the omission, which would strengthen their case and fortify their claim to expenses, as your Lordships are aware that a professional man can give no better reason for obtaining his expenses than the failing of an injurious and groundless charge brought against his character. That was a reason, which I can well understand, why the very learned and experienced counsel below, who had the conduct of the cause, said it was a mere question of expenses, but took especial care to say nothing of the cause of complaint,—the omission of which is the only ground of appeal

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

before your Lordships. Accordingly, the Court below, in those circumstances, and for the reasons stated more than once in the argument, adopted the report of the auditor, and ordered the parties in the cause to pay the balance, with interest from the 17th of November. It happened in the meantime (and this is the last fact which it will be necessary to mention) that certain cattle having been sent by the Messrs. M'Aulays to the great yearly Hallow Fair at Edinburgh, Messrs. Adam and Brown had lodged an arrestment against the purchaser of those beasts for the unpaid price, or the sum due in respect of them; that arrestment was loosed afterwards; for the Messrs. M'Aulays sent two bills of 200*l.* each, one of which was paid upon the 23d of February, when it apparently became due, and the other we have no account of. That 200*l.* ought to have been credited,—it is not credited; and that will reduce the sum for which the judgment is to stand. In like manner, it follows that the interest upon the sum of 200*l.* subsequent to the 23d of February must be deducted from the amount of the judgment, and the only interest due upon that 200*l.* is from the 17th of November 1831 to the 23d of February 1832; but, with that exception, I am clearly of opinion that the interlocutor below must stand. I will now proceed shortly to state what other reasons I may have for rejecting the argument of the appellant, and agreeing with the Court below; and although in stating the facts of the case, and in the comments I have made already, sufficient reasons are afforded to support the decision; yet on account of the importance of the question relating to the taxation of costs, and the conduct of professional men, I shall more distinctly state the

grounds on which I think this appeal cannot be maintained: First, Let us consider whether, in point of fact, the argument is well grounded on which is raised the objection to the auditor's report, namely, that the report did not comply with the instructions of the order of the 8th of March 1832, inasmuch as it did not contain a special report on the different subjects and points in question upon the petition. I must read these words, as all words in all instruments are to be read, whether they be deeds or wills or judgments, rationally, and with a view to what must be their sense, regard being had to the subject matter upon which they are used. Can I, giving the Court the benefit of that construction, in fairness say, that the exigency of this order was such as to make it imperative upon the auditor to report specially upon all subjects and points that were in question under the petition and answers, whether they continued to be in question or not, when the subject matter of that petition and those answers should come before him in his office of auditor? I cannot see that he was so bound; it must have reference to the scope of the proceeding. If it had been of a twofold nature, it would have been otherwise. If it had been, on the one hand, the demand of a solicitor's bill on a private party, and on the other hand also, an application to strike him off the roll, made by the party resisting that demand;—if, upon the solicitor having claimed his bill, the client not only objected to pay, but charged the attorney with mal-practices, and called upon the Court to punish him, then I can understand how it would be material for the auditor, in taxing the bill, to report upon matters no longer in dispute between the parties; because, although their

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

dispute about the bill no longer required that they should be entered into in his report, yet the other part, the punishment sought against the solicitor, might require that they should be inquired into. But there is no such second objection in this suit, or any reference to it. It never came before the Court at all in that way; it never was regarded by the Court in that light; it is simply with a view to the rights of the parties,—that is the only question; and we cannot say that it continued to be of the slightest importance what became of the charge of fraud and fabrication, after the items connected with it were abandoned on the part of the solicitor and no longer in dispute before the auditor. Therefore I am disposed to put upon this the reasonable and consistent construction which I have now stated to your Lordships, and to hold that the auditor, under these circumstances, was only bound to make a special report upon those matters raised by the petition and the answers, and which should continue to be in contest between the parties before him, in his office of auditor. Now, he has reported upon all those subjects; he has not reported upon the matters connected with the fraud, those matters being no longer before him. This is the first answer to that which is alone the ground of the appeal; but the second answer is material, because it is that upon which the principal stress is laid. Admitting, then, that in point of fact the auditor did not comply with the order,—admitting, for argument's sake, that my construction of the second order is wrong, and that he was bound to report upon all the questions raised by the petition and answers, whether those questions continued to be agitated before him by the

parties or not, — admitting all that, — then I am of opinion that the act of sederunt has not been complied with by the appellant in the Court below, in such a way as to enable him to take the objection to the auditor's report. It is said by the appellant, that although, if the first interlocutor had stood alone, and the proceedings had been under it only, no objection whatever would be taken, except according to the provisions of the act of sederunt, by reducing it to writing, nevertheless this proceeding before the auditor was not under the first remit, but the second remit; that the second remit is casus omissus in the act of sederunt; and that of course any thing done under it is not within the purview of that act. I am of a contrary opinion, upon two grounds: first, I hold this to be a proceeding before the auditor, for the reason I mentioned in the first part of the argument, not only upon the order of remit of the 8th March 1832, but also upon the original order of remit of the 15th of December 1831. I have shown that the one did not abrogate the other; that they might both stand together; the first is as much alive as the second, and consequently the auditor proceeded as much upon the first as the second. The first is the governing order, — it is the order that commissioned him to tax; he has taxed, and is not that taxation within the scope of the act of sederunt? It is perfectly plain that, to take it out of the act of sederunt, you must clearly show facts applicable to a case to which the act does not apply, or you must produce an exception in the act of sederunt that will apply to this special case. Is there any exception? It is as general as words can make it; all reports, orders, and all pro-

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

ceedings upon taxation, must be held to be within it, because there is no qualification—no restriction whatever—to confine its operation. It is said that they shall be remitted—of course to the auditor; that applies to the amount; and the second, by reference to the first, incorporates the first within it; it refers to it by words; and according to these regulations it is necessary, in my opinion, that the objection shall be made in writing. It says distinctly.—“ In case either party means to object to the report of the auditor, he shall immediately lodge with the clerk a note of his objections.” “ In case either party means to object to the report of the auditor;”—there is no exception; every objection taken to every report of the auditor is to come within the scope of the act, and to be governed by its provisions. No objection can be made, unless in compliance with the wholesome and, I think, necessary condition of being reduced, with its short reasons, into writing, that the Court may know upon what it proceeds,—that the other party may know what he has to answer,—and that the officer of the Court may see to what the party objects, and by what he will bind himself, and that the endless contestation upon the items of the account as well as upon its principle may be cut short. A party seeking to take this out of the act of sederunt is bound to show that the act does not apply to it; and upon what ground do they say so? It is this; not that the order which originally sent the matter to the auditor is not provided for in the act of sederunt, but that after it had put the auditor in possession of the case, and bound him to proceed under it, a second order was made, calling upon him to report upon special circum-



stances. I can see no ground for this position, or for doubting that the party was bound by the exigency of the act of sederunt, and having failed to comply with it, it is too late now to take the objection in the Court below or here.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

But independent of this it appears to me that the whole appeal is an appeal upon costs; and this is the last of the reasons I shall urge as a ground for recommending your Lordships to confirm the decree. I have granted, for the sake of the argument only, that the construction I put upon the second order was an erroneous one, and that you were to take the auditor as not having complied with the second order. I will now admit also, for argument's sake, that my second argument was wrong, and that the act of sederunt does not apply to this case. Then it would follow that the party was not concluded;—he would not be precluded from objecting to the report of the auditor. But how does that bear upon the present case? Of what avail is it to Messrs. M'Aulay, that there should have been an omission upon the subject of these fabrications? In one of two ways only can that omission bear at all against the respondents case, or in favour of the appellant; either by showing that the fabrications took away all right in Messrs. Adam and Brown to be paid the items by the M'Aulays, connected with the fabrications, or as affecting the question of costs. In no other conceivable way could the omission touch the point in question. But as to the first head, those items are out of the question,—they were abandoned,—the auditor has not allowed them,—they never were in question after the case went into the auditor's office. On the first ground, therefore, this omission is entirely and absolutely immaterial.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

Then, on the second ground, can the appellant avail himself of it? No; because the second ground is, that this omission deprived the appellant of a good argument for being allowed his expenses, and against the other parties expenses being allowed from him: that is the only argument. Then, is not that costs? If the Court of Session had given A. his costs out of B.'s pocket, instead of giving B. his costs out of A.'s pocket, that would have been admitted to be a question of costs, and not the subject of appeal. Is it less a question of costs, that the Court of Session are said to have done this,—to have given A. his costs out of B.'s pocket, instead of B. out of A.'s pocket, by means of another order, upon which they do not make the auditor report upon a thing that they ought to have made him report upon? That is the whole argument,—that the Court of Session did not give the Messrs. M'Aulays their costs, but made them pay Messrs. Adam and Brown their costs, for want of a special report from the auditor;—that if the auditor had reported specially, the Court would have allowed the appellants their costs; but as they have not chosen to call for such a special report, the appellants have not got costs, but have had to pay them. Is that less a question of costs? It is particularly, and exclusively a question of costs; therefore it is not a subject of appeal. I think it is very likely, if we had been sitting in the Court below, we might have taken a distinction between the costs up to one point, and after that point, in the case. The staggering nature of Robertson's fabrications might have inclined one to have great tenderness to the Messrs. M'Aulays, in the resistance they made to a claim of any kind connected with

those fabrications by any person who had at any time availed himself of them, though he had no share at all in them,—though he was cleared from all participation in them,—though he had been unjustly impeached of the participation, and though he stood perfectly fair with the Court in respect of them,—yet it might have been thought, that having employed Robertson, another professional man, as their agent, they should not have received but rather paid costs up to a certain stage of the proceeding; but that would have been a very early stage—it would have been at the threshold of the Court—it would have made a difference of a few pounds, and therefore I do not know that we need feel much regret at this course not having been pursued. I have already said that there is no ground for any impeachment of the character of these gentlemen; and for the reasons I have stated upon the facts of the case and the correspondence, I shall recommend to your Lordships to affirm, with the alteration suggested, the decree of the Court below; and that alteration will go to the interlocutor last appealed from, confirming the report of the auditor of the 15th February 1834, and that it will consist in adding the sum of 200*l.* to the sum of 304*l.* 13*s.* 8*d.*, and a clause respecting the interest. It will stand thus—“under deduction,” then leaving out the sum 304*l.* 13*s.* 8*d.*—“under deduction “504*l.* 13*s.* 8*d.*,” leaving out the words, “as stated in “the petition,” and then, “together with the legal interest on the balance from the 17th December till the “23d February,” and then add these words, “deducting from such amount the interest upon 200*l.*, from “and after the 23d February 1832.” That is the only

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

alteration I mean to suggest to your Lordships. I have not called upon the respondents' counsel to argue this case, though I meant to suggest an alteration, because I understood they took no objection to it; the consequence is, that these circumstances will raise the question as to the costs of this appeal. Now, undoubtedly, though an appeal upon mere costs does not lie, yet if there is an appeal upon a substantial question, not colourable, if brought, costs may be dealt with by your Lordships. I have stated why I do not recommend disturbing the costs below; and in case it should be said this is not an appeal upon costs, as there is to be an alteration of the interlocutor to the amount of 200*l.*, it must further be observed that we cannot suffer a party to lie by and allow an error to be committed, abstain from making any remark,—a single word being sufficient to correct the error,—and then avail himself of that error to the effect of letting in the question of costs. There is a blot in the decree. Why did he not hit it below? If he did not hit it, it was not the other party's duty, and he shall not avail himself of that blot he has left, in order to thrust his hand through the decree, and by means of that blot reach hold of the question of costs. If you were to allow any other course to be pursued as a general rule, you would see constant instances of little matters being left, and not corrected in the Court below, in order to let in the question of costs by way of appeal. I shall not, however, recommend your Lordships, under the peculiar circumstances of this case, and these parties having obtained more than their original demand,—not upon the ground of character or conduct, except that they have raised

their demand—I shall not recommend your Lordships to give any costs<sup>1</sup>, after granting the principle as to costs by the observation I have made.

M'AULAY  
v.  
ADAM and  
BROWN, Jun.  
—  
7th May 1835.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed, with this variation, that the appellant, in addition to the deduction of 304*l.* 13*s.* 8*d.*, mentioned in the interlocutor of the 15th (signed 18th) February 1834, is entitled to a further deduction of the sum of 200*l.* paid by him on the 23d of February 1832, under deduction of the interest due thereon from the 17th day of November 1831 until the same was paid.

RICHARDSON and CONNELL — THOMAS DEANS, —  
Solicitors.

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<sup>1</sup> The counsel for the respondents having intimated their desire to be heard on the question of the costs of the appeal, they were then heard; but Lord Brougham intimated it would hardly do, after so material an alteration as £200, to give the costs of the appeal to the respondents.

[12th May 1835.<sup>1</sup>]

SAMUEL CATTERNS, Trustee on the Sequestrated Estate  
of Arthur Scott, Bleacher in Glasgow, Appellant.—  
*Pemberton—A. M'Niel.*

HUGH TENNENT, Respondent.—*Lushington—Parker.*

*Lease—Hypothec.*—A proprietor let premises for a manufactory, and bound himself to communicate to them a supply of steam-power by means of a shaft from an engine in adjoining premises belonging to him, and to furnish a supply of water, and the rent for the premises was fixed, but the amount of the consideration for the steam-power and water was left to the determination of arbiters: Held, (reversing the judgment of the Court of Session) that his right of hypothec over the *invecta et illata* in the premises let, was available in security for the whole consideration, including that for the power and water.

2D. DIVISION.  
Lord Medwyn.

—  
12th May 1835.

IN the year 1830 the respondent entered into a contract with the appellant, which was expressed in the following missives:—

“ Mr. Arthur Scott.

Glasgow, 4th May 1830.

“ Sir,—I am willing to give you a lease, for fifteen  
“ years, of the ground and buildings pointed out to you  
“ at Wellpark, lately occupied as a brewery, at the  
“ yearly rent of 75*l.* sterling, rising every subsequent  
“ year 3*l.* during the lease; of which ground and  
“ buildings I shall furnish you with a plan, to be sub-  
“ scribed by each of us; also the garden, with the  
“ additional ground at and near the counting-house, at

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<sup>1</sup> 12 S., D., & B. p. 686.

“ the further rent of 5*l.* per annum during the lease,  
 “ but with liberty to myself to take possession of said  
 “ garden-ground at the expiry of five years from this  
 “ date, upon giving you six months’ notice in writing,  
 “ when said rent of 5*l.* shall cease.

CATTERNS

v.

TENNENT.

12th May 1835.

“ I will allow you a private entry to these premises,  
 “ for your family only, from the road which leads to  
 “ the house occupied by myself, so long as I find it  
 “ agreeable; which private entry is to be shut up when-  
 “ ever I require you to do so; entry to the premises to  
 “ be given immediately, and the rent to commence from  
 “ Whitsunday first; which, together with the rent to  
 “ be charged for water, steam, and steam-power, is to  
 “ be paid at the usual terms of Martinmas and Whit-  
 “ sunday. The premises are not to be occupied for  
 “ any other purposes than those of bleaching, dyeing,  
 “ printing, singeing, calendering, or distilling of spirits,  
 “ without my permission in writing.

“ Whatever alterations you may require in the build-  
 “ ings for your operations are to be done at your own  
 “ expense, none of which are to be to the injury of the  
 “ houses as they at present stand. Said buildings are  
 “ to be kept and left by you in good tenantable condi-  
 “ tion, till the termination of the lease.

“ I also engage to furnish you, during the lease, with  
 “ the whole power of the said steam-engine at present  
 “ on my premises, and to put a shaft through the wall  
 “ into the premises to be occupied by you, to which  
 “ you will connect your machinery, which is to be fitted  
 “ up on the most improved principle, and that will,  
 “ in the opinion of the referees, be least hurtful to my  
 “ engine. The time of keeping the said power in  
 “ motion to be twelve working-hours per day, and to be

CATTERNS  
v.  
TENNENT.  
—  
12th May 1835.

“ paid for according to the rent to be fixed upon by the  
“ gentlemen afterwards named as referees, whether you  
“ occupy it for the whole twelve hours or not. I am  
“ not, however, to be liable for stoppages that may be  
“ occasioned by necessary repairs, and in consequence  
“ of any thing going wrong with the engine from which  
“ you derive said power, except by making up lost  
“ time. And, if need require, I am to have two weeks  
“ per annum for repair of engine and boiler, without  
“ any deduction from the rent to be charged for said  
“ steam-power. Whatever extra time you require said  
“ steam-power, an extra price to be charged accordingly.  
“ Any odd time arising from stoppages of the engine,  
“ beyond the specified time for repairs, to be settled for  
“ at the end of the lease. I reserve to myself the power  
“ of letting or using the extra power of the engine for  
“ my own purposes, at any time which does not inter-  
“ fere with the twelve hours above mentioned; it being,  
“ however, understood, that I am to have liberty to use  
“ the engine during these twelve hours, for a few  
“ minutes only, occasionally to the extent of half a  
“ horse-power, for pumping worts, &c.

“ I also engage to give you as much water as I can,  
“ at a rent to be fixed upon by the referees afterwards  
“ named, but from which rent fifteen per cent. is to be  
“ deducted from the price charged by the Glasgow  
“ Water Company; which water is to be pumped by you  
“ out of the wooden cistern at your own expense; for  
“ which purpose I will give you the use of the pumps  
“ already on the premises, which you are to keep up.  
“ I further engage not to charge you for the power  
“ necessary to pump the water.

“ I farther agree to give you the injection water



“ from the engine, which you will conduct into your  
 “ premises, the rent for which injection water is also  
 “ to be fixed by the referees.

CATTERNS  
 v.  
 TENNENT.

12th May 1835.

“ It is understood that the minimum power of the  
 “ engine, for which you are to pay rent, is not to be less  
 “ than that of three-horse-power, from the commence-  
 “ ment till the termination of the eighth year of the  
 “ lease, and that, from the commencement of the ninth  
 “ year till the termination of the lease the minimum  
 “ power for which you are to pay rent shall not be  
 “ less than six-horse-power.

“ The price to be paid by you yearly, from the com-  
 “ mencement, and during the continuance of the  
 “ lease, for the steam, steam-power, and water, together  
 “ with any difference of any kind, should any un-  
 “ fortunately arise between us, as well as any increased  
 “ supply of water which you may require from time to  
 “ time, to be referred to the decision and final determi-  
 “ nation of Mr. Rolland of the Glasgow Water Com-  
 “ pany, and Mr. James Allan of the house of Messrs.  
 “ Peter Brown and Company, merchants in Glasgow,  
 “ with liberty to them, in case of need, to appoint an  
 “ umpire, whose decision shall be binding upon us; and  
 “ in case of death, or unwillingness of any of these  
 “ gentlemen to act, that we shall name other gentlemen  
 “ to act in their place, whose award, or their umpire,  
 “ shall be equally binding on us. I am, Sir, your  
 “ obedient servant,

HUGH TENNENT.

“ I omitted to mention, that I reserve the water of  
 “ the well on the premises to be let to you entirely to  
 “ myself, and that I shall have liberty at all times to  
 “ clear it, as well as to repair the drains from the  
 “ brewery, which pass through said premises. It is  
 “ understood that nothing is to be removed from

CATTERNE  
v.  
TENNENT.

12th May 1835.

“ the premises that was there at the time of your  
“ entry.”

“ Hugh Tennent, Esq.                      Glasgow, 3d July 1830.

“ Sir,—I have received your letter of offer, dated  
“ 4th May, of which the annexed is a copy, which offer  
“ I hereby accept; and have the honour to be, Sir,  
“ your most obedient servant,              ARTHUR SCOTT.”

It was alleged by the respondent, that in consequence of Mr. Rolland's death Mr. John Stephen was appointed to act along with Mr. Allan in fixing the rent of the steam-power and water; but that these parties having differed in opinion, Mr. James Cook, engineer, was appointed by them to fix the rent of the steam-power, and Alexander Anderson to fix the rent of the said water. That this was done by a written minute, subscribed by parties which had fallen aside; that the rent of the steam-power was fixed by Mr. Cook, for the first year. at 90*l.*; and that Mr. Anderson had also issued an award, settling the principles on which the water-rent was to be calculated. The appellant denied that any such minute had been agreed to, and that Messrs. Cook and Anderson had any authority' to issue the awards which they had done; but it was admitted that Scott had engaged the use of the steam-power and of the water.

Founding on these missives, the respondent, on 1st April 1831, presented a petition to the sheriff of Lanarkshire, setting forth, “ That the half-year's rent  
“ due at Martinmas last, amounting, for the house and  
“ garden, to 40*l.* sterling, for the steam-power, to 45*l.*  
“ sterling, and for the water, at least, to 50*l.*, are wholly  
“ unpaid. And the said Arthur Scott, who has failed  
“ in his circumstances, and is now in jail, has caused  
“ his household furniture and other effects, and in par-

“ ticular the several articles thereof specified in the  
 “ inventory which is herewith produced, to be removed  
 “ to the house of Robert M’Culloch, founder, residing  
 “ at Govanhaugh, for the purpose of defeating the just  
 “ claims of the petitioner and his other creditors there-  
 “ upon ; he therefore prayed for warrant to officers of  
 “ Court to pass to the house of the said Robert M’Cul-  
 “ loch, and there to take possession of the household  
 “ furniture and other effects belonging to the said  
 “ Arthur Scott, and which were removed as aforesaid  
 “ from the premises possessed by the said Arthur Scott  
 “ under the petitioner ; to carry back the said articles of  
 “ household furniture to the said premises, and there to  
 “ inventory, sequesterate, and secure the same, with such  
 “ other articles of household furniture, machinery,  
 “ utensils, and others as may be found upon the said  
 “ premises, and also to sell the whole of the said articles  
 “ by public roup, in payment and satisfaction to the  
 “ petitioner of the half-year’s rent before specified, due  
 “ at the term of Martinmas last, of the interest accruing  
 “ thereon, and of the expenses of this application and  
 “ procedure to follow hereon, and in security of the  
 “ half-year’s rent to become due at the term of Whit-  
 “ sunday next.” Warrant was granted accordingly ;  
 but before carrying the warrant to sell into execution  
 the respondent presented a memorial, stating, that since  
 the warrant was granted the estates of Scott had been  
 sequestered, and Samuel Catterns, the appellant, elected  
 trustee ; that Mr. Catterns had sold those articles belong-  
 ing to the bankrupt, which had been carried back to the  
 premises, and sequestered ; that there had also become  
 due the Whitsunday rent for the premises, amounting  
 to 135*l.*, thus making the whole rent for the year amount

CATTERNS  
 v.  
 TENNENT.

12th May 1835.

**CATTERNS.** to 270*l.* sterling ; that, in the expectation that Mr. Cat-  
**v.**  
**TENNENT.** terns would satisfy the rent, the respondent had delayed  
12th May 1835. executing the warrant of sequestration granted against  
any of the effects, excepting those which were clandestinely removed by the bankrupt ; but as he did not intend to do so the respondent prayed for a renewal of the warrant to sequestrate the machinery, utensils, and other articles upon the premises, and thereafter to sell them in satisfaction of the year's rent due at Whitsunday last, and to ordain Mr. Catterns to consign in the hands of the clerk of Court the proceeds of the subjects carried back to the premises, and sequestered there, and which Mr. Catterns, while they were still under sequestration, disposed of in manner already mentioned. This memorial having been served on Mr. Catterns, he lodged answers, in which he maintained, first, that the price or rent of the steam-power and water had never been fixed ; and, second, that no warrant to sell in satisfaction of such price or rent could be granted, as it was not covered by the landlord's hypothec. The sheriff allowed proof prout de jure, and in particular as to the alleged minute constituting Messrs. Cook and Anderson referees. The appellant having been allowed to advocate, which he did, and the case having come before Lord Medwyn, he pronounced this interlocutor :  
“ In respect it is averred by the respondent, both in  
“ the inferior Court and in this Court, that on the death  
“ of Mr. Rolland ‘ a written minute was subscribed by  
“ ‘ the tenant Scott and the respondent, appointing  
“ ‘ Mr. Stephen to act as the new referee in room of  
“ ‘ Mr. Rolland, but this written minute has been mis-  
“ ‘ laid,’ remits to the sheriff, with instructions to recall  
“ his interlocutor in so far as it disposes of the objections

“ (No. 36 of process), but to allow the respondent to  
 “ establish the above allegation by the examination of  
 “ havers and witnesses, and thereafter to proceed further  
 “ with the proof prout de jure; remits to the sheriff  
 “ also to dispose of the expenses in this Court at the  
 “ issue of the cause. Note.—The Lord Ordinary can-  
 “ not agree with the rationes in the sheriff’s interlocutor,  
 “ although in the circumstances he sees no objection to  
 “ the latitude of the proof allowed. A proof prout de  
 “ jure implies that the proof is not to be confined to  
 “ written evidence, but that parole proof is allowed of  
 “ those facts which, by our law, may be competently  
 “ established in that way. Accordingly, in every inter-  
 “ locutor allowing such a proof, diligence is granted  
 “ against havers and witnesses. Neither can the Lord  
 “ Ordinary agree with the sheriff in thinking that the  
 “ appointment of Mr. Stephen is a devolution to be  
 “ proved rebus ipsis et factis. It is in fact a new  
 “ nomination of an arbiter; and in a matter of such  
 “ importance, requiring a written minute to that effect,  
 “ it may not be possible to recover the minute of ap-  
 “ pointment, but it will be sufficient to prove that it  
 “ once existed; and that it was acted upon by the parties,  
 “ particularly by Scott, as is averred by the respondent,  
 “ will greatly strengthen the proof that it once existed.”  
 Both parties acquiesced in the judgment; and the case  
 being returned to the sheriff, a proof was taken according-  
 ly; and after a great deal of litigation in the course of it,  
 the sheriff ultimately pronounced this interlocutor:—  
 “ Finds it admitted that the rent of the premises in question  
 “ was 80*l.* per annum, as fixed by the missive (No. 12  
 “ of process), and that the rent of the steam-power and  
 “ of the water supplied to the tenant, Arthur Scott,  
 “ were to be ascertained by the award of arbiters;

CATTEENS  
 v.  
 TENNENT.

12th May 1835.

CATTERNS  
v.  
TENNENT.  
12th May 1886.

“ finds it proved that the referees (Messrs. Allan and  
 “ Stephen), having differed in opinion, devolved the  
 “ disputed rent of the steam-power upon Mr. James  
 “ Cook, whose award forms No. 14 of process, and the  
 “ question of water-rent upon Mr. Anderson, whose  
 “ award is No. 13 of process; finds no proof of the  
 “ defender’s averment that the supply of water was  
 “ deficient in quality or quantity agreeably to the mis-  
 “ sive; and having considered the memorial and report  
 “ for the pursuer (No. 83 of process), approves thereof,  
 “ authorizes the Royal Bank to pay to the pursuer the  
 “ contents of the deposit receipt for 190*l.* 14*s.* 6*d.* in  
 “ extinction pro tanto of his claim of rent; finds the  
 “ pursuer entitled to demand and apply in a similar  
 “ manner the sum of 38*l.* 13*s.* 2*d.*, being the proceeds,  
 “ including interest, of the sale of part of the hypothec  
 “ carried off from the premises and sold by the defender  
 “ Catterns; and after deducting 20*l.* paid to ———  
 “ M’Culloch, as a compromise of his claim to said arti-  
 “ cles, ordains Samuel Catterns, defender, to pay said  
 “ sum of 38*l.* 13*s.* 2*d.* to the pursuer, to be applied  
 “ accordingly; and finds, that after applying these two  
 “ sums of 190*l.* 14*s.* 6*d.* and 38*l.* 13*s.* 2*d.*, when recovered,  
 “ towards payment pro tanto of the rent for which seques-  
 “ tration was originally awarded, there will remain a  
 “ balance of 87*l.* 7*s.* due to the pursuer, for recovery  
 “ whereof reserves all competent procedure at the pur-  
 “ suer’s instance; and finds Samuel Catterns, defender,  
 “ liable in expenses.” And on an appeal to the sheriff  
 he pronounced this judgment: “ Having particularly  
 “ adverted to the terms and import of the paper (No. 12  
 “ of process), entitled ‘ Missives of Set,’ finds that  
 “ the contract, as embraced in said missive, is wholly of  
 “ lease, and not partially of sale, as contended by the

“ defender; finds that the subject matters of said lease  
 “ are the premises and works therein described, with the  
 “ steam-power and supply of water; finds that there  
 “ are no grounds in the special circumstances of the  
 “ case, or in general law or practice, for holding that  
 “ the right of hypothec does not attach to that part of  
 “ the rent effeiring to the steam and water-power, but,  
 “ on the contrary, finds that the premises, with the  
 “ accessories of steam and water-power, must be viewed  
 “ (to use the ordinary language) as a public work, to the  
 “ rents of which as a whole the right of hypothec does  
 “ attach; therefore, and for the reasons assigned in  
 “ the interlocutor complained of, refuses the prayer of  
 “ said petition, and adheres to the interlocutor reclaimed  
 “ against.” The question was then brought under the  
 consideration of the Court of Session by advocacy, and  
 having again come before Lord Medwyn, he pronounced  
 this judgment :—

“ (11th March 1834).—The Lord Ordinary having  
 “ resumed consideration of the debate, and advised the  
 “ process, advocates the cause; finds, in the circum-  
 “ stances of this case, that the landlord’s right of hypo-  
 “ thec does not give him a preference for the rent or  
 “ sum paid for the power of the steam-engine which he  
 “ undertook to furnish, and for the water which he  
 “ engaged to give to the tenant of the ground and houses  
 “ let, but that it only covers the separate rent paid for  
 “ the said premises; therefore recalls the interlocutor  
 “ submitted to review; finds that the rent, for which  
 “ the hypothec is available, amounts to 80*l.*, with interest  
 “ since Whitsunday 1831 and till paid, for which, and  
 “ for the expense of sequestration, authorizes the Royal  
 “ Bank at Glasgow to make payment to the pursuer and

CATTERNS

v.

TENNENT.

19th May 1835.

CATTERNS

v.

TENNENT.

12th May 1835.

“ respondent from the deposit receipt for 190*l.* 14*s.* 6*d.*,  
 “ reserving to the pursuer and respondent his other  
 “ claims against the advocator, and to him his defences,  
 “ as accords; finds the advocator liable in the expenses  
 “ incurred in the inferior Court, including the former  
 “ advocacy; but finds the respondent liable in the  
 “ expenses in this Court of the present advocacy, and  
 “ decerns, &c. Note.—The circumstances of this case  
 “ are so peculiar, that its decision will not affect any  
 “ general rule or practice by which it may be established,  
 “ that, where a manufactory is let with the use of  
 “ steam-power at a slump rent, the whole rent may be  
 “ recovered in virtue of the right of hypothec. But here  
 “ there is a separate rent for the real subject, the natural  
 “ object of the landlord’s hypothec, and a separate rent  
 “ or price for the steam-power and water supplied,  
 “ and these are not even situated on the premises let, but  
 “ only introduced into them from the adjoining subject,  
 “ which might not even be the property of the proprietor  
 “ of the manufactory. Under these circumstances  
 “ the Lord Ordinary knows of no decision which  
 “ authorizes the application of the law of hypothec to  
 “ such a case, and cannot see any principle for its exten-  
 “ sion to such subjects of contract.

“ The summary application being only for securing  
 “ the benefit of the hypothec, what is not secured  
 “ thereby cannot fall within the petition. Seeing how  
 “ much litigation there has been, and the keenness with  
 “ which every plea in defence has been urged, the Lord  
 “ Ordinary regrets that, according to his view of the  
 “ case, it is incompetent for him to proceed farther, and  
 “ exhaust the matters in dispute between the parties.  
 “ However, having considered the proof, he thinks it



“ right to indicate his opinion, that it has been proved  
 “ that Scott proposed to substitute Mr. Stephen in the  
 “ room of Mr. Rolland, and that Mr. Tennent agreed  
 “ to this proposal; that this proposal and agreement  
 “ were both written instruments; that the devolution on  
 “ Mr. Anderson and Mr. Cook, by the arbiters, has  
 “ also been established; and although these writings,  
 “ with the exception of the devolution on Anderson,  
 “ have not been recovered, their existence and contents  
 “ are sufficiently established; and farther, that the par-  
 “ ties, and particularly Scott, acquiesced in and com-  
 “ municated with the referees. Under these circum-  
 “ stances, if this had been a competent process, the  
 “ Lord Ordinary would have sustained the awards.

“ As to expenses, the Lord Ordinary cannot help  
 “ thinking, that although the advocator has been suc-  
 “ cessful in the action on a ground of law, his conduct  
 “ of the cause must make him liable for the expenses in  
 “ the inferior Court. The proceedings in that Court he  
 “ has examined with attention. If the advocator had  
 “ confined his objections solely to the question of law,  
 “ and craved the opinion of the Court thereon, probably  
 “ the expense would not have been great; but, by the  
 “ innumerable objections taken during the proof, the  
 “ advocacy, and the numerous reclaiming petitions in  
 “ the inferior Court, in almost all of which he was un-  
 “ successful, he must have occasioned a very great  
 “ expense. Even in the former advocacy he was sub-  
 “ stantially unsuccessful also; his main plea being, that  
 “ the reference could only be proved by writ or oath of  
 “ party. No doubt the respondent, on the other hand,  
 “ has pleaded incompetent pleas in this process of  
 “ sequestration. But after the interlocutor of the sheriff,  
 “ referring so strongly to the practice, the Lord Ordi-

CATTRENS

v.

TENNENT.

12th May 1835.

CATTERNS  
v.  
TENNENT.  
—  
12th May 1835.

“ nary is not inclined to hold that he was so much to  
“ blame in bringing forward his plea, in a matter where,  
“ as yet, there is little authority to be a guide, as to  
“ cancel his right to expenses incurred by the conduct  
“ of the cause in the inferior Court. But the successful  
“ party must, of course, be entitled to the expenses in  
“ this Court.”

The appellant having presented a reclaiming note to the Second Division against the interlocutor of the Lord Ordinary, in so far as it found him liable in expenses, and did not find him entitled to expenses; and the respondent having also reclaimed in so far as it found that his right of hypothec did not give him a preference for the price of the steam-power and water, and found him liable in the expenses incurred in the second advocacy; their Lordships pronounced this interlocutor:—

“ (6th June 1834).—The Lords having advised the  
“ cause, and heard counsel for the parties, alter the  
“ interlocutor of the Lord Ordinary submitted to re-  
“ view; repel the reasons of advocacy; remit the  
“ cause simpliciter to the Sheriff of Lanark; find ex-  
“ penses due; allow an account thereof to be given  
“ in, &c.”

Catterns appealed.

*Appellant.*—1. The landlord's hypothec is a right which belongs to him as proprietor of the heritable subject let, and gives him a preference over the effects of the tenant found upon the premises, to the effect only of securing the rent of that heritable subject; but a person supplying or letting by contract steam-power or water, for an annual payment, has no hypothec, and no such preference.

It may be true that there may be cases in which the consideration given for a supply of steam-power or water may be so blended with or merged in the rent of the premises that the whole would fall under the operation of the landlord's right of hypothec. For example, if valuable premises are let with the advantages of steam-power, or of water conducted into them, and if the rent stipulated be a slump rent for the premises with these advantages, then the steam-power or water may be regarded as accessories or benefits, and it would generally be impracticable, and always inexpedient, to attempt to separate the consideration given for the steam-power or water from the proper rent of the premises. The proper subject of the lease in such a case is the premises; but it is the premises, with these benefits, which may, to a certain extent, have increased the rent, just in the same way as an obligation to keep a house heated with air, or lighted with gas, or supplied with water, would have its effect in increasing the rent. In such a case the rent for these benefits would not be separable from the rent of the premises in a question as to the landlord's hypothec.

CATTRENE  
v.  
TENNENT.

12th May 1835.

There is first a lease of the premises, which is the only proper lease; and then there is a contract to supply steam-power, and a contract to sell water. It is true that the respondent, who is the landlord of the premises let, is also the contractor to furnish the desired supply of steam-power and the desired supply of water. But this circumstance does not alter the case. He happens to possess these different characters, but it is only in one of them, viz. the character of landlord, that he has any right of hypothec. He has no such right in his character of contractor to supply steam-power, or to supply water. Let it be supposed that these contracts, though between

**CATTERNS**  
**v.**  
**TENNENT.**  

---

**12th May 1835.**

the same parties, had not been in the same writing with the missive of lease; that there had been separate missives; a missive of lease of the premises, a separate missive relative to the supply of steam-power, and a separate missive relative to the supply of water; there would, in such a case, be no pretence for extending the right of hypothec beyond the rent of the premises, so as to give a preference over the tenant's effects, for the contract price of the steam-power or water.

It is true that the three offers are here made by one letter written, and are all accepted at the same time; but that circumstance cannot affect the question. The premises which formed the subject of the lease are separately stated and described, and the rent of them is separately stated. It is only in regard to these that the respondent possesses the character of landlord, or that the right of hypothec consequently is applicable. The parties themselves have separated the rent of the premises from the consideration to be given for the supply of steam-power, and from the consideration to be given for the supply of water. They are not blended together as in the case of a slump rent. The steam-power and water cannot be regarded as mere benefits or adjuncts of the premises, for the consideration given for them is not included in the rent of the premises, but is carefully separated and distinguished from it, and is in amount much more than double the rent of the premises. The premises are let at a fair rent, according to their value, independent of the steam-power and water. They had been let to the previous tenant at a similar rent, without steam-power; and they might have been used by the bankrupt without steam-power. But he chose to have steam-power, and the respondent was willing to furnish him with a supply of steam-power; he also chose to

have water, and the respondent was willing to furnish him with a supply of water, at a rate fifteen per cent. lower than the charges of the Glasgow Water Company, from whom it might have been got. It suited the convenience of both parties that the bankrupt should take his supply of steam-power and water from the respondent; but for these he was to pay, separately, the full value according to the quantity supplied. The sum to be paid for steam-power or for water did not affect the rent of the premises, and although the offer of the lease of the premises was contained in the same letter with the offer to supply steam-power and the offer to supply water, yet the rent of the premises was kept as separate and distinct from the price of the steam-power or of the water as it would have been if the offer of lease had been contained in a separate letter.

CATTERNS  
v.  
TENNENT.

12th May 1835.

In the Court below much stress was laid on the circumstance, that in the missive letter the consideration to be given for the steam-power is sometimes called rent; and, in like manner, that the consideration to be given for the water is sometimes called rent. But the term "rent" is there used inaccurately, and is not the only term used; the term "price" is sometimes used, and with greater accuracy. Thus: "Whatever extra time you require said steam-power an extra price to be paid accordingly."

It was also maintained in the Court below that the premises and the steam-power and water must be regarded as an unum quid, because they were all to be employed for carrying on one manufacture. The force of this argument is not apparent. The premises, the steam, and the water were all to be used by the bankrupt for the manufacture which he intended to carry on; but that observation would have applied equally if these several requisites had been contracted for by different

CATTERNS  
v.  
TENNENT.  
12th May 1835.

writings, or even with different persons. It would also have applied to any of the other commodities, such as coals, soda, vitriol, &c., without which the manufacture could not have been carried on. But the considerations to be given for these several requisites of the manufacture are totally distinct from the rent of the premises and from each other. The right of hypothec is a peculiar right—a privilege which belongs to the landlord as proprietor of heritable premises for securing the rent of these premises, but which does not belong to him in his character of contractor to supply water or steam; and if the rent of the premises payable to him, as landlord, be kept by the parties quite separate and clearly distinguishable from every thing else, the right of hypothec will apply to that rent, and to it alone.

There is no precedent for extending the right of hypothec in the manner contended for by the respondent, and there is no expediency in stretching it to such an extreme length, especially in a case of bankruptcy. The equalizing principles of the bankrupt law are against such unfair preferences. The common fund for division among the creditors is sufficiently encroached upon by allowing the landlord to draw out of it, in the first place, the full amount of the rent of the premises, without allowing the contractor for steam-power, and the contractor for water, also to draw out of it the debts due to them.

2. On the point of expenses, as the appellant was successful in the first advocacy, he ought not to have been subjected in the expenses of that advocacy, but ought to have been found entitled to the expenses incurred by him in that advocacy, and in the inferior Court.

*Respondent.*—The subject let was one subject, an unum quid, and it is impossible to separate the water

and steam let along with the premises from the buildings in which the process of manufacture is to be carried on.

CATTERNS  
v.  
TENNENT.

12th May 1835.

The subject let was not the buildings merely, or the water merely, or the steam merely, but the buildings, steam, and water, all equally the property of the landlord, and all equally indispensable to the use to be made by the tenant of the subject. If any one had been withheld by the landlord it would have afforded a good ground to the tenant for withholding, not merely the rent applicable to that particular subject, but the whole rent. Suppose that the landlord had withheld the buildings,—he could not have demanded the rent for the steam and water. Suppose he had withheld the steam which constituted the moving power of the machinery, or the water whose refrigeratory qualities were essential to the success of the dye-work,—he could not have demanded the rent for the buildings standing by themselves. The subjects being complex, and the joint operation of all required for enjoyment by the tenant, the joint concession of all could alone be held due implement of his part of the contract by the landlord.

The foundation of the landlord's right of hypothec is, that he is proprietor of the subject let to the tenant, and therefore it is that he has by immemorial usage been entitled to extraordinary securities for the payment of his rent above any other class of creditors. As it is the circumstance of being the owner of the soil which constitutes the foundation of his right, so it follows that whatever he lets as owner of the soil, and which is locally situated on the soil, becomes subject to the extraordinary privileges which he enjoys. Of these the most valuable are, that the fruits of the soil in agricultural subjects, the *invecta et illata* in a manufactory or urban tenement, or

CATTERNS  
v.  
TENNENT.  

---

12th May 1835.

all the moveable subjects brought by the tenant within the subjects let, become the subject of security for the rent. So far is this carried in the Scotch law that it has long been a settled point that the landlord of a dwelling-house or manufactory, which yields no natural fruits, is entitled to retain in security of his rent, and to sell for its payment within the time allowed for that purpose by law, not only the moveables or furniture belonging to his tenant brought within the subject, but even the furniture hired by him for its temporary occupation.

This being the general law on the subject, there is no ground for doubting that the privilege of hypothec extends to that which is paid for steam and water belonging to him brought into the subject, as well as that which is paid for the buildings in which those elements are to be used. Cases frequently occur in which the rent paid to the landlord is a complex rent, composed partly of what is paid for the buildings themselves, and partly for other adventitious qualities or advantages furnished by the landlord, or pertaining to his property. Suppose that a mill is let by a landlord, who also at the same time furnishes the stream of water by which its machinery is to be turned, and which are both placed on the landlord's property,—it never was contended in such a case that the rent paid for the mill alone was the subject of hypothec, and not also that paid for the use of the stream by which alone it could be brought to yield a rent in the hands of the tenant.

The circumstance of the rent being here fixed in money for the buildings, and not for the steam and water, can make no difference. That happened merely because the means of fixing in money the rent of the steam and water were not at the moment accessible. If the rent to be paid in money for the whole had been ascer-



tained at the moment there would not have been three rents, but one rent for the buildings, steam, and water. As the rent, however, of the two last depended upon a reference, it was not inserted at the moment in the missive, but left for ulterior determination; and from the circumstance of one of the proposed arbiters having died, and of the bankruptcy of the tenant having supervened soon after he entered into the premises, no lease was drawn out fixing one rent in money for the whole three. But there can be no doubt that if the lease had been drawn out after the award of the arbiters had been given, there would not have been three separate sums for the buildings, water, and steam, but one rent for the whole three.

It appears a very narrow ground of decision in such a case, to lay hold, as the Lord Ordinary has done, of the mere circumstance of the rent for the buildings, steam, and water being not contained in one sum, as a ground for holding that a distinction is to be drawn between them, and that the privilege of the landlord's hypothec is to be applied to the one and not to the other. Even looking to the form of the writing which passed between the parties, there seems no ground for such a distinction; for no proposition is better fixed in law than that where the means of fixing and ascertaining a sum are given in a deed it is the same thing as if the ascertainment itself had taken place; and still more, where the subject matter of the agreement is considered, when it is recollected that the subjects let were let for one joint purpose, and that towards the due enjoyment of the subject by the tenant all three were equally requisite, no doubt can exist that all three form the subject of one indivisible agreement, and that to all three the common law of landlord and tenant is applicable.

In regard to expenses, the interlocutors are well founded

CATTERNS  
v.  
TENNENT.  
12th May 1835.

CATTERNS  
<sup>v.</sup>  
 TENNENT.  
 12th May 1835. because nearly the whole was occasioned by the pertinacity with which the appellant contested the validity of the awards,—a line of defence which totally failed.

LORD BROUGHAM.—My Lords, this cause began before the sheriff of Lanarkshire, on a question of competition between the respondent, Mr. Tennent, and the other creditors of Arthur Scott, a bankrupt, represented by the trustee and assignee, Catterns, the appellant. Mr. Tennent claimed a preference, in virtue of a lien or right of hypothec which he set up on account of rent in arrear; and the rent arose thus:—He was the owner of the premises where Scott's trade was carried on, and Scott occupied it under an agreement, or missive of tack, to which it is material that we should closely attend. Mr. Tennent first agrees to let the ground for fifteen years at 80*l.*, called in one place 75*l.* a year rent, increasing 3*l.* yearly, and the garden at 5*l.* more, with a break at the end of five years. After various conditions as to the occupation, Mr. Tennent goes on further to agree respecting steam and water power. He is to furnish the surplus steam-power of his engine, situated on the contiguous premises not demised, for twelve hours a day, and at a sum which is called rent, to be fixed by persons named as referees,—and more hours, if convenient to him (the lessee), for an extra sum; and he engages to fix a beam through the wall, in order to communicate this power. He further engages to furnish, at a rent to be also fixed by the same referees, as much water as he can from his reservoir, situated on the premises not demised;—the water to be pumped up by the lessee, who is not to be charged for the power required for the pumping. The lessee is likewise to have the injection water from the lessor's engine, at a rent to be

CATTERNS  
v.  
TENNENT.

12th May 1835.

fixed by the same referees. This agreement for steam-power and water is to continue during the currency of the lease. The referees fixed the rent for the steam-power at 90*l.*, and that for the water at 108*l.* 8*s.* The sheriff held that this agreement gave the lessor a right of hypothec, in respect of the whole rent or whole sums, as well the 198*l.* 8*s.* for the power and water as the 80*l.* or 75*l.* rent for the premises, holding the whole contract, as he states in his interlocutor, to be one of lease, and not partially of sale; and this judgment having been brought by advocacy before the Court of Session was reversed by the Lord Medwyn, Ordinary, who considered that the hypothec only enured for the rent of 80*l.* or 75*l.*, and not for the price of the steam-power and water supplied. From this interlocutor the lessor reclaimed to the Lords of the First Division, who unanimously altered the Lord Ordinary's interlocutor, repelling the reasons of advocacy from the sheriff, and remitting to that judge, with expenses. I have omitted all reference to a great deal of intermediate or preliminary procedure which took place before the sheriff, because the judgment on the merits must first be considered, and then that on the costs, which alone makes it necessary to consider the other proceedings. It is admitted that a question is here raised of the first impression; there is no decision which at all governs the case in terms; and we can only have recourse to plain legal principle. But that, I think, is sufficiently clear to carry us through the argument, and to that I therefore proceed. Now, it is quite manifest, that if there had been no lease of the brewery premises, there could have been no pretext for treating the price paid for the steam-power and water as rent, and consequently no right of hypothec, in respect of any part of that price remaining

CATTERNS  
v.  
TENNENT.  
12th May 1835.

unpaid. This proposition seems to require no proof, and no authority; nevertheless, it was decided expressly in the case of *Auld v. Baird*, 31st January 1829. Auld being a snuff manufacturer, with a steam-power, Baird erected on the next close a power-loom, and made a contract with Auld to be supplied for ten years (break at the end of five) with the surplus of steam-power at 10*l.* a horse. Auld maintained that this was a lease, and claimed his right of hypothec as for rent. The Lord Ordinary directed Cases, and the Court clearly decided on these arguments against the claim, holding the contract to be no lease. This case will be found in 5 *Shaw and Dunlop*.<sup>1</sup> If, then, the present decision stood upon the footing of the 108*l.* 8*s.*, and the 90*l.* being rent, and if these payments, and the matters for which they are the consideration, were unconnected with any other sum, properly speaking a rent, and any other thing, the proper subject of demise, no doubt whatever could be entertained on the question. Rent, in fact, is something reserved, or supposed to be reserved, out of the fruits or value of the thing demised, and the tenant is only supposed to take and occupy what is over and above the portion reserved by the landlord or owner. The very phrase of rent reserved shows it; and this was the origin of the right of hypothec, which accordingly is only for one year. Lord Kaimes gives the same account of it in an ingenious essay, forming the tenth of his *Elucidations*. This shows that land, or real property, is the proper subject of leasehold tenures, and of the contract of lease, and that to rent due on such property alone the doctrine of hypothec is applicable. Indeed, the earliest leases were more like charters than contracts, being

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<sup>1</sup> 5 S. & D., p. 264; new ed., p. 246.

of one part only, and a grant from the owner; and so Lord Stair and Lord Bankton both state—2 Stair, 9, 3; 2 Bankton, 9, 20. So, too, Mr. Erskine (2, 6, 27) says, that by construction the statutory protection of lessees, by the Act 1449, was extended to mills and fisheries as fundo annexa. But when there is not one, but two contracts, and the different matters of those two contracts are complicated together, a different view of the subject may arise. For, then, there being a proper subject of demise, and a rent reserved, strictly and properly so called, with the rent there may be mixed up the fruits of another contract,—the consideration of another thing given or lent during the currency of the proper lease, and that may follow the rent, as an accessory does the principal, so as to be confounded with, or lost in it. The common case of a furnished house at once occurs, and affords an example of this mixture; there is one rent received for both house and furniture; and although the furniture alone could not be the subject of a demise, and its consideration never could be separately held to be rent, yet when it forms part of the same contract, and is confounded or mixed up with the rent, it follows its fate, and the whole becomes rent together. This question was decided in the Common Pleas, not many years ago, in the case of *Newman v. Anderton*, 2 New Reports, upon great consideration; and the Chief Justice, referring to the well-known case in the fifth report, (*Spence's case*, 5 Co. Rep. 15 *a.*) seems to admit that the rule would not apply if the things were severable, and the agreement as to part was collateral to the other agreement as to the rent; for the ground of decision is, that the rent all arises from the house, and none from the furniture. So, in *Smith v. Mapleback*, 2 Term Reports, 641, the assignee of the

CATTERNS

v.  
TENNENT.

12th May 1835.

CATTERNS  
v.  
TENNENT.  

---

12th May 1836.

lessee made a contract with the lessor, whereby the lessee was bound to pay, over and above the rent, a part of the sum paid for goodwill; this was held a surrender of the term, and that there was no distress competent to him at all, the assignee's remedy being by assumpsit on the contract. The case referred to in *Newman v. Anderton* has always been considered to give the law upon the subject of covenants in leases,—I mean *Spence's case*. A part of the third resolution is material to our present purpose: “If a man demise a house and land for  
“ years with a stock or sum of money, receiving rent,  
“ and the covenantee consents to deliver the stock or  
“ sum of money at the end of the term, yet the assignee  
“ shall not be charged with this covenant; for, although  
“ the rent received was increased, in respect of the stock  
“ or sum, yet the rent did not issue out of the stock or  
“ sum, but out of the land only, and therefore, as to  
“ the stock or sum, the covenant is personal.” Upon this plain ground, the rent separately received for the steam-power and water cannot be said to issue from the brewery premises, but from the running water. In like manner, if a landlord demises two closes for one rent, it is entire, although he afterwards in the lease explains that part is in respect of one and part of the other: but if part is reserved for one and part for the other close, though the whole is in one lease, the rents are separate. It is true that there is a case in the Court of King's Bench, decided some years ago, apparently on no great consideration, which seems in conflict with these principles,—I mean that of *Jardine v. Wilson*, 4 Barnewall and Alderson,—where a covenant to supply with water a house demised, for a separate but fixed rent, was held to run with the land. I cannot agree with that decision. The argument that

this water might have been supplied by carrying it in buckets as well as by laying pipes seems unanswerable, and I am quite unable to reconcile the decision either to principle or to other cases, such as the Mayor of Congleton v. Briten, in 10 East, 130. But even if Jardine v. Wilson be law, it by no means follows that, in respect of distress, the water rent, or rather the consideration for the water, being separately reserved, and not forming part of the reddendum for the house, could have been distrained for. I think they clearly could not, even if we admit that the covenant ran with the land. I can see nothing in the principle of our law, as I state it here, to make it inapplicable to the Scotch law of lease-holding; and it is decisive of the question: for, once make the consideration paid for the steam-power and water separate from the rent, and there is no longer any ground whatever to hold that consideration any thing like a rent, or the subject of distress or of hypothec. It must not, therefore, be supposed that I proceed upon any other than a principle of Scotch law, when I profess my very decided opinion that the sums agreed by Scott to be paid for steam-power and water were separate from the rent in his lease, and formed no part of that rent; there can be no principle of Scotch law upon which these two sums may be regarded as parcel of the rent. They were stipulated for separately by the lessor in his missive of tack,—the only leasehold contract in the case. He first lets the land and buildings, the proper subject of a demise, for a certain sum,—80*l.* a year, which is, properly speaking, rent: he then lets, as it is called, but I call it contracts to furnish a steam-power and supply of water to his lessee of the ground. But the terms on which he is to furnish both are not even

CATTERNS  
v.  
TENNENT.

12th May 1835.

CATTERNS  
v.  
TENNENT.  
—  
12th May 1835.

stated in the missive,—they were not ascertained between the parties at the time when the 80% rent was reserved for the premises; for the sums to be paid were left to be ascertained afterwards by the award of referees. It is impossible to conceive a more plain case of separate demises, and several rents reserved, if the steam and the water could be made the subject of demise, and the consideration of rent; and it is therefore impossible to conceive a clearer case of the rent for the land and buildings being separate from whatever you choose to call that consideration which is stipulated for the steam-power and the water supplied. But if the rent, properly so called, is separate from that which they, by a kind of comparison or analogy, call rent for steam and water, past all doubt the case is gone; for it is admitted, and if not admitted, it is proved by *Auld v. Baird*, that the contract for a steam-power cannot be likened to a lease.

As for the water being different in respect of this argument from the steam-power, the fact does not bear this view out. Mr. Tennent had a tank or reservoir, and agreed to let Mr. Scott have water out of it, on terms to be fixed afterwards. Suppose he had agreed to send it in buckets, or to allow Mr. Scott to send for it in this manner, nobody could maintain such an agreement to be any thing like an agreement for a lease; it is a mere collateral agreement, an agreement for something in gross, unconnected with the subject of the demise, and forming no part of it, any more than its consideration, when liquidated by the award of the referees, forms part of the rent.

I therefore am of opinion, that the sheriff was wrong in his view of the merits, that the Lord Ordinary was right, and that the Court was wrong in reversing his Lordship's decision, and restoring that of the sheriff.



The question of costs remains. The Lord Ordinary gave the respondent his costs of the first advocacy, when he remitted to the sheriff with instructions; the effect of which was, in a material respect, to reverse the interlocutor of the sheriff, and to give the appellant the benefit of having appealed. It is clear that this never can be; the appellant must not merely not pay his costs of the advocacy at all, he having to some extent prevailed, but he must also have his costs of whatever proceedings before the sheriff the Lord Ordinary directed, in order that the sheriff might decide in his favour. As for the other proceedings before the sheriff, wherein he decided against the appellant, and the Lord Ordinary did not alter his interlocutor, the costs of these must still be paid by him, the appellant. But he is to pay none of the costs of the first advocacy.

CATTERNS  
v.  
TENNENT.

12th May 1835.

Of the second advocacy, wherein the Lord Ordinary reversed the sheriff's interlocutor, no costs were awarded against the appellant, nor ought he to receive any costs from the respondent in that advocacy.

But the Court of Session has made the appellant pay the costs of the application to them against the Lord Ordinary's interlocutor; and of those costs he must of course be freed. But he is to receive no costs from the respondent for that application.

The question of costs, therefore, is now disposed of here, with the exception of the costs of the process before the sheriff, prior to the first advocacy; those costs must go back to the auditor, with this instruction, that he is to allow the appellant his costs of such proceedings before the sheriff, as the Lord Ordinary found by his first remit ought to have terminated before the sheriff in the appellant's favour; and that he is to allow the respondent his costs of such proceedings before the

~~interlocutor~~ ~~interlocutor~~, as were, according to the Lord Ordinary's first ~~interlocutor~~ ~~interlocutor~~, considered to have terminated properly in ~~the~~ ~~respondent's~~ ~~favour~~.

The House of Lords ordered and adjudged, That the said ~~interlocutors~~, so far as complained of, be and the same are hereby reversed: And it is further ordered, That the said ~~cause~~ be remitted back to the said Court of Session, with ~~instructions~~, first, to find and decern in terms of the said ~~interlocutor~~ of the Lord Ordinary of date the 11th March 1834, excepting in so far as is hereby reversed, and that the right of the landlord's hypothec, claimed by the said Hugh Tennent, respondent, does not attach to the rent or price for the steam-power and supply of water in question, but only to the separate rent for the buildings and grounds leased; and, second, to find that the said appellant is not liable in the expenses of the first and second advocations, nor of the reclaiming note to the Inner House in the said appeal mentioned, and that he is not entitled to the expense of such proceedings from the said respondent, but that the said appellant is entitled to the expenses from the said respondent of such proceedings before the Sheriff Court of Lanarkshire, as by the Lord Ordinary's interlocutor and remit in the first advocation was found ought to have terminated before the sheriff in the appellant's favour, and that the said respondent is entitled from the said appellant to the expenses of such proceedings before the sheriff as were according to the Lord Ordinary's said interlocutor and remit in the said first advocation considered to have terminated in the respondent's favour; and with instructions to the said Court of Session to remit to the auditor to fix and allow such expenses before the sheriff accordingly: And it is further ordered, That the said Court of Session do proceed further in the said cause as may be just, and consistent with this judgment.

THOMAS DEANS — RICHARDSON and CONNELL —  
Solicitors.

[12th May 1835.]

JOHN HUTTON SYME, Appellant.—*Sir William Follett.*

PETER BROWN, Respondent.—*Serjeant Spankie.*

*Proof.*—Circumstances under which the partners of a joint stock company were held (affirming the judgment of the Court of Session) to be competent witnesses in a question, whether a partner had purchased shares for behoof of another person, who alleged that he had been deceived by misrepresentations to agree to purchase.

THE respondent Brown, merchant in Edinburgh, raised an action of declarator, payment, and relief before the Court of Session against the appellant Syme, a brewer in Alloa, setting forth, that in the month of May 1829 the appellant applied to the respondent to assist him in procuring fifty shares of the stock of the Edinburgh, Glasgow, and Alloa Glass Company: That he represented, that as the Stirling Banking Company, of which he was a partner, although just about obtaining a discharge under their sequestration, had not finally accomplished that object, it would be as well to have the shares taken, in the first instance, ostensibly in the name of some third party; and he prevailed on the respondent to allow his name to be interposed for that purpose, on the express condition, that so soon as the appellant obtained his discharge as a partner of the Stirling Banking Company the shares should be regularly and formally transferred to his own name: That, in consequence of this arrangement, the respondent purchased in his own

2d DIVISION.

12th May 1835.

SYME  
v.  
BROWN.

12th May 1835.

name, but for behoof of the appellant, fifty shares of the stock of the company, at 3*l*. 10*s*. per share; and he granted a missive to the appellant, to the effect that he had sold him the shares at that rate: That the appellant shortly thereafter reimbursed the respondent for the money so advanced: That in the following month of June the appellant requested the respondent to obtain for him other fifty shares of the same stock, which the respondent accomplished at the same rate as in the former transaction; he gave the appellant a letter to that effect, and the appellant afterwards reimbursed the respondent for his advances: That some time thereafter the Stirling Banking Company and the individual partners thereof were discharged, and the sequestration of their estates wound up, and on this being done the respondent became anxious to have the shares thus ostensibly standing in his name formally transferred to the appellant; but as the company had in the meantime become a losing concern the appellant refused to take a transference of the shares: That in consequence the respondent was compelled to pay certain instalments of the one hundred shares, to the extent of 200*l*., and two other instalments had been demanded by the company, which the respondent was in danger of being compelled to pay, amounting to 300*l*. He therefore subsumed that the respondent, having made the payment of 200*l*. for behoof of the appellant, was entitled to reimbursement from him; and being liable for the sum of 300*l*., and to be called on for farther payments so long as his name stands as a partner of the company for the shares, the appellant was not only bound to relieve him of all such payments, with interest, but also to relieve him entirely from every risk or responsibility connected with these shares of the stock, by immediately

getting the shares effectually transferred to his own name and risk; and he concluded that it should be found and declared, that the one hundred shares of the stock were purchased for behoof of and belong to the appellant, who ought to be decerned, at his own expense, to have the shares regularly transferred from the respondent to himself, according to the forms and in terms of the contract and regulations of the company; also to make payment to the respondent of the sum of 200*l.*, advanced and paid by him, and interest thereof from the respective periods of advance; and in the event of the respondent being obliged to advance the other sum of 300*l.*, or any part of it, or to make any farther advances or payments on account of the shares, the appellant should be ordained to pay the amount of the same to him, with interest thereof from the periods of advance till payment; as also generally to free and relieve the respondent of all calls or payments exigible or to become exigible by or to the company on account of the stock.

SYME  
v.  
BROWN.

12th May 1835.

In defence the appellant stated, that the respondent had adventured largely in the company, having a large number of shares, and was by the contract appointed one of the original directors, and he then removed from Edinburgh, and took up his fixed residence at Alloa, where he took the sole charge as manager, and where the appellant first became acquainted with him; that among other topics which formed the frequent subject of conversation, the state and prospects of the Glass Company was a favourite one, and often introduced by the respondent, who represented it to be as in the most flourishing condition, and in order to induce the appellant to purchase he entered into a variety of particulars and minute details, showing, not only that it was perfectly

SYME  
v.  
BROWN.  

---

12th May 1835.

solvent, but that a very certain and large profit would be derived by those who should become partners, and that on the faith of those statements the appellant was induced to give the respondent authority to buy the shares to the extent and at the rate and in the mode stated in the summons, he therefore pleaded, that having been induced by fraudulent concealment and misrepresentation on the part of the respondent, a holder of stock to a large amount, and the managing director, to enter into the transaction, he was not bound thereby, or liable for any part of the sums concluded for.

The following issues were sent to a jury :—

1. Whether, in the month of May 1829, the defender employed the pursuer to procure fifty shares of the stock of the Edinburgh, Glasgow, and Alloa Glass Company, and, in the month of June 1829, fifty other shares of the said stock, for behoof of the defender; and whether the pursuer did accordingly procure said shares; and whether the defender wrongfully fails to take delivery of the said shares, or any of them, and to pay the calls effeiring thereto, and otherwise relieve him as libelled? or,

2. Whether, by the false and fraudulent representations or fraudulent concealment of the pursuer, as to the credit and solvency of the said company, the defender was induced to purchase the said shares or any of them?

At the trial before the Lord Justice Clerk, as President of the Second Division, and a common jury, the respondent put in evidence a great many documents to prove the first issue; and in anticipation of the evidence to be led by the appellant in support of the second issue he adduced, among other witnesses, several part-

SYME  
v.  
BROWN,

12th May 1835.

ners of the company. In particular, in the bill of exceptions, afterwards presented, he offered “ Maurice Lothian, solicitor in Edinburgh, who, it was admitted by the counsel for the pursuer, was a partner of the said Edinburgh, Glasgow, and Alloa Glass Company, and had been a partner of the said company for several years. Whereupon the counsel for the defender did object,—That the said Maurice Lothian was not a competent witness for the pursuer in this action, in respect that he was a partner of the said Edinburgh, Glasgow, and Alloa Glass Company, and as such partner was materially, directly, and immediately interested in the issue of this action, inasmuch as it was for the interest of the witness that the pursuer, being still a partner of the company, should obtain decree in terms of the libel in this action; and, in support of this objection, the said counsel for the defender did offer instantly to prove that the said Edinburgh, Glasgow, and Alloa Glass Company was absolutely and irretrievably insolvent at the date of this action. But the said Lord President did overrule the said objection preferred by the counsel for the said defender, and did allow the said Maurice Lothian to be received and examined as a witness for the said pursuer. Whereupon the said counsel for the said defender did except to the foresaid opinion and deliverance of the said Lord President, and did tender their exception accordingly.” Several other witnesses who were in the same position were objected to, but the objection was repelled; and after they had been fully examined by the respondent, and cross-examined by the appellant, the following statement appeared in the bill of exceptions :—“ And it being ad-

SYME  
v.  
BROWN.  
12th May 1835.

“mitted by the counsel for the pursuer, that all the  
“witnesses objected to were partners of the said Edin-  
“burgh, Glasgow, and Alloa Glass Company, the  
“counsel for the defender did then and there state to  
“the said Lord President, that, in consequence of the  
“decision of the Court allowing the said witnesses to  
“be examined, and the turn the evidence had taken,  
“they now gave up the case. And the said Lord Pre-  
“sident did direct the jurors aforesaid to find for the  
“pursuer on both issues; and the said jurors did ac-  
“cordingly find for the pursuer on both issues.” The  
bill of exceptions<sup>1</sup> was afterwards presented to and heard  
before the Second Division, who (5 Feb. 1835) dis-  
allowed it, and found the defendant liable in expenses.<sup>2</sup>

Syme appealed.

*Appellant.*—The defence of the appellant resolved into an allegation, that his consent to purchase the

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<sup>1</sup> The bill contained a full recital of all the documents, and of the notes of the presiding judge; and in reference to this the appellant stated,  
“It is necessary to explain in what manner the bill of exceptions which  
“has been disallowed comes to embrace a great deal not material to the  
“decision of the question. As originally framed by the appellant, the bill  
“was brief enough, and only set forth the objections which had been  
“taken to the witnesses whose evidence was deemed inadmissible, and the  
“evidence which they gave. The bill in this form met with the appro-  
“bation of the learned Lord Chief Commissioner Adam, who, though not  
“now a judge on the Scotch bench, is pleased to favour the profession  
“with his valuable assistance in all matters relating to trial by jury. The  
“bill was then signed by the judge who presided at the trial. But at the  
“hearing of the exceptions the respondent insisted that the whole of the  
“judges’ notes should be engrossed in the bill; and the court being of  
“opinion that this request ought not to be resisted, the appellant con-  
“sented. The consequence has been, that the bill has assumed its present  
“unwieldy appearance, and embraces much more than is material to the  
“decision of the question upon which the judgment of this House is  
“called for.”

<sup>2</sup> XIII. S. D. B. 407.



shares had been obtained through gross and wilful misrepresentation and concealment of the situation of the company at the time he was induced to communicate with the respondent. If the allegations of the appellant be true, it is plain that the respondent and all the subsisting partners of the company had a material interest to induce as many persons as possible to become shareholders of the concern, with the view of obtaining the greatest possible security against being obliged to sustain more than their rateable proportion of the loss. Besides, in regard to third parties, the subsisting partners have an interest to get in additional associates, because, by so doing, they diminish the chance of attack upon themselves, and are less likely to be placed in the situation of parties who have to levy contributions on the other partners, instead of being merely rateable contributors. And the risk arising from the possible bankruptcy of any of the subsisting partners, who, while solvent, may be made universally responsible, materially increases the interest of all the present partners in having new parties introduced, so as to enlarge the aggregate of individual responsibility, and improve the chances of mutual relief among the subsisting partners. It was in these circumstances that the respondent adduced his socii as witnesses. Although the appellant was at one time sequestrated as a partner of the Stirling Bank, he has obtained his discharge, and is now perfectly solvent. So that the attempt is not to bring in an insolvent partner into the company, but one of whose solvency there is no question. Had it been contended that the appellant was insolvent, the question as to the admissibility of the respondent's copartners might have been viewed differently, because their interest might have been dif-

SYME  
v.  
BROWN.

12th May 1835.

SYME  
v.  
BROWN.  

---

12th May 1835.

ferent. This question is always one of circumstances, and will be decided according to the interest which these circumstances may create. In arguing it, the case of Mr. Lothian may be taken, and it is plain he had an interest that the appellant should be found to be a partner. The respondent was, independent of the shares purchased for the appellant, a partner, so that this is the case, not of the substitution of one person for another, but of the introduction of an additional partner. It is admitted that all the shares have not been paid up, and that many of the instalments still remain due. Now, the partner introduced into the company is obliged to pay to his copartners a proportion of whatever sum shall not be recovered from the defaulters. It is true, that the obligation will attach according to the number of shares which are held; but the security is greater from two persons than one, even admitting that both are solvent. The respondent concludes for payment of instalments said still to be due, or for relief of demands that may still, and some of which inevitably must, be made for the liquidation of the debts of the company. It is admitted that the respondent is bound for these instalments, and he must pay them if he is able; and it is obviously for the interest of Mr. Lothian to obtain a guarantee for that payment? It is true, that it may be indifferent to him by whom the payment is made; but it cannot be indifferent to him to have a guarantee for the sure payment. The respondent bought the shares in question, and whether, in buying them in his own name, but for behoof of the appellant, he deceived the latter or not, the respondent must make good to the copartners all the obligations corresponding to these shares; but if he succeeds in showing that he did not deceive

the appellant, then the appellant is bound to relieve him; that is, he too will be bound to make good all the obligations corresponding to these shares.

SYME  
v.  
BROWN.

12th May 1835.

If this were the case of a sale to a person who comes into the market on his own account, and being unable to do so by the contract of copartnery, makes a new sale to another purchaser, there might be room for contending, that if the sale were validly effected, the first purchaser was out of the field, and the company must take the second purchaser; and that if both were solvent, it was a matter of indifference to the company which of the purchasers retained the share. This was the view taken in the Court below; but it is quite erroneous. It is the case where there will be two partners in place of one, and consequently two parties from whom the other partners may obtain relief instead of one only.

Therefore it is obvious Mr. Lothian had an interest to make the appellant a partner. The decree in this action would clearly make the appellant a partner, for the judgment would be probatio probata to all the world; and the appellant could never maintain, after such decree, that he was not a partner. No doubt the decree might be *res inter alios acta*, but it could never be *res alia* in the question whether he was a partner or not; Lothian had, therefore, precisely the same interest to bring in new partners which the respondent had. Every benefit which would accrue to the respondent would also accrue to Lothian, and consequently the latter cannot be admitted to further that interest.<sup>1</sup>

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<sup>1</sup> Tait on Evidence, p. 355, (last edition); Bank of Scotland v. Padon, 10 July 1824 (S. D.); 2 Stair, p. 413 (More's edition); Muschet v. Christie, 5 July 1759 (16768); Ralston v. Rowat, 3 Clark & Finnelly, p. 424;

SYME  
v.  
BROWN.  
—  
12th May 1835.

*Respondent.*—1. The course adopted by the appellant before the jury, if he meant to prosecute it farther in any other shape, was contrary to the express directions of the statute which regulates trial by jury in civil cases in Scotland. By that act (55 G. 3. c. 35. s. 7.) it is provided, that “ it shall be competent to the counsel  
“ for any party at the trial of any issue or issues to  
“ except to the opinion and direction of the judge or  
“ judges before whom the same shall be tried, either as  
“ to the competency of witnesses, the admissibility of  
“ evidence, or other matter of law arising at the trial ;  
“ and that on such exception being taken the same shall  
“ be put in writing by the counsel for the party object-  
“ ing, and signed by the judge or judges ; but, notwith-  
“ standing the said exception, the trial shall proceed,  
“ and the jury shall give a verdict therein for the pur-  
“ suer or defender, and assess damages when necessary ;  
“ and after the trial of every such issue or issues the  
“ judge who presided shall forthwith present the said  
“ exception, with the order or interlocutor directing  
“ such issue or issues, and a copy of the verdict  
“ of the jury indorsed thereon, to the division by  
“ which the said issue or issues were directed, which

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Carter v. Pearce, 1 Term. Rep., Durn. and East., 163 ; Radburn v. Morris, 3 Car. and P. 254 ; S. C. Nom. Radburn v. Morris & Bottomley, 4 Bing. 649 ; Vaughan v. Worrell, 2 Swan, 399 ; and in Mulvany v. Dillon, 1 Ball. & B., 409 ; Tindal C. J. in Fox and Clifton, 6 Bing. 776 ; Col. on Partnership, p. 626 ; Pothier, *Traité du Contrat de Société*, c. 6. s. 1 ; Lord Eldon in Carlen v. Drury, 1 Ves. & Beam. 157 ; Starkie on Evidence, p. 105, et seq. ; Phillips, vol. i. p. 59 ; Bent v. Baker, 3 Term. Rep. 27 ; Smith v. Prager, 7 T. R. 60 ; Collyer's *Treatise on Partnership*, p. 455 ; 2 Esp. Rep. 608 ; Buckland v. Tankard, 5 Term Rep. p. 579 ; Powel v. Gordon, 2 Espinasse, p. 735 ; Evan's Pothier, tit. Evidence ; Starkie on Evidence, p. 119 ; Brown v. Brown and Jubb, 4 Taunt. 752 ; Chapman v. Graves, 12 Campbell, N. P. C. 333 ; Ripley v. Thompson and two others, 12 Moore, p. 55.

“ division shall thereupon order the exception to be  
 “ heard in presence, on or before the fourth sederunt  
 “ day thereafter.”

SYME  
 v.  
 BROWN.  
 ———  
 12th May 1835.

Now, the appellant, instead of allowing the trial to proceed, stopped it short, and stated judicially that he gave up the case.

Accordingly, the rule bears that “ it being admitted  
 “ by the pursuer, that all the witnesses objected to were  
 “ partners of the said Edinburgh, Glasgow, and Alloa  
 “ Glass Company, the counsel for the defender did  
 “ then and there state to the said Lord President, that  
 “ in consequence of the decision of the Court allowing  
 “ the said witnesses to be examined, and the turn the  
 “ evidence had taken, they now gave up the case.”

The appellant, therefore, was not within the statute at all when he presented the bill of exceptions; and as this is entirely a statutory remedy, he is not entitled to it at all, if he is not in the precise case that the act points out. The act, however, only allows a bill of exceptions where a trial proceeds and is finished, and not where the case is given up before the proof is closed.<sup>1</sup>

2. There was no intelligible or specific objection taken at the trial, nor is there any set forth in the bill of exceptions, to the admissibility of the witnesses.

It is impossible to discover in the bill of exceptions upon what ground in law it can be maintained that the witnesses were improperly admitted. It is merely said that the witness was incompetent, “ in respect that he

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<sup>1</sup> Doe v. Lord Teynham, 6 Bing. p. 561; Alexander, 2 Crompt. & Jer. p. 133; Scott, 3 Murray, p. 529; Gilchrist, 3 Murray, p. 367; Philipps on Evidence, chap. v. sect. i.; Vaughan, 2 Swanston, p. 399; Earl of Fife, 1 Mur. Rep. p. 130; 3 Mur. p. 451; 4 Mur. p. 176; Middleton v. Frost, 4 Car. & Payne, p. 16.

SYME  
v.  
BROWN.  
—  
12th May 1835.

“ was a partner of the said Edinburgh, Glasgow, and  
“ Alloa Glass Company, and as such partner was ma-  
“ terially, directly, and immediately interested in the  
“ issue of this action, inasmuch as it was for the  
“ interest of the witness that the pursuer (respondent),  
“ being still a partner of the company, should obtain  
“ decree in terms of the libel in this action.” This is  
the only explanation that was given by the appellant  
at the trial, of his objection to the competency of the  
witnesses in question, and it is the only explanation set  
forth by him in his bill of exceptions, which is the only  
record or pleading that can be looked to on the subject.  
It is merely said, that the witnesses were incompetent,  
as being interested that the pursuer should obtain a  
verdict, because they were, like him, partners of the  
glass company; but it is nowhere explained how this  
circumstance created an interest. The glass company  
were not pursuers of the action, or parties to it in any  
shape, and therefore the objection to the witnesses can-  
not rest on that ground; neither is it pretended that  
they were liable with him in the expenses of the suit,  
or were connected to him by relationship, so that the  
objection cannot refer to any plea of that description.

It is indeed impossible even to explain the alleged  
interest without travelling out of the bill,—without sup-  
posing and imagining facts, or a possible state of facts,  
not even alleged in the bill. But before an objection to  
a witness can be sustained on the ground of interest  
that interest must be proved as matter of fact, and it  
must be stated as matter of record.

3. From the terms of the issues it is manifest that the  
first was that in which alone, in the first instance, any  
burden of proof lay on the respondent. But that issue,

(which relates simply to the fact of the appellant having authorized the respondent to buy one hundred shares of the stock for him,) was proved by the documentary evidence alone. And if any farther proof were necessary, there was the evidence of the two first witnesses examined, to whom no objections of any sort were stated; and accordingly the respondent left the first issue with the jury upon that evidence.

SYME  
v.  
BROWN.

12th May 1835.

The second issue was framed with the view of giving the appellant an opportunity of proving his charges of fraud, if he could. The whole burden of establishing these averments lay on the appellant; and therefore the question put to the jury under the second issue was, “Whether, by the false and fraudulent representations or fraudulent concealment of the pursuer, as to the credit and solvency of the said company, the defender was induced to purchase the said shares or any of them?”

But it was the right and duty of the respondent, before closing his case as pursuer, to meet these allegations, and with that view to adduce the various members of the company who could establish that the appellant had, by inquiries at themselves, taken means to ascertain the real state of the company from those best acquainted with its affairs. The members of the company were obviously the witnesses best qualified to speak to the origin and cause of their later embarrassments, and to prove their opinion of the prospects of the company, and the real worth of the shares in 1829, when the purchases were made for the appellant's behoof. In order to establish the facts on this part of the case, the respondent called as witnesses five gentlemen, who were shareholders in the company at the period of their examination.

SYME  
v.  
BROWN.

12th May 1835.

The appellant objected to these witnesses as incompetent on the ground of interest. He alleged that the company was insolvent,—at least that its stock could not meet its engagements;—that there must be large contributions from the partners to provide for the loss; and that the general body of shareholders had thus a direct interest to get the appellant declared a partner, so as thereby to have an additional party liable to them for relief of a sum against the loss sustained by the company.

But it was plain that the shareholders had no interest in the present question. The whole loss on the shares must be borne either by the respondent or appellant, according as the right to the shares may be ultimately declared. So that it was of no importance to the other partners from which of the present litigants the contribution came. No doubt, if the respondent had been bankrupt, the other shareholders might have had an interest in having the shares transferred to a more solvent party; but no allegation of bankruptcy against the respondent was made.

Nay, the shareholders had rather an interest against the respondent, for the appellant himself only got his discharge as a bankrupt in the year preceding the date of the summons in this action,—and, therefore, if any weight could be given in a question of this sort from remote contingencies or probabilities, the chance rather was that the respondent was a better partner for the other shareholders than the appellant.

Besides, even if any interest had been made out, the partners would have been competent, from the peculiarity of their situation, and from the necessity of the case, as they could speak to facts which they alone, in the ordi-



nary course of business, could be acquainted with. The state of a company's affairs can only be properly known to the partners. And when the purchaser or assignee of a share of any joint-stock association says that he relied on the statements of the seller alone, it must surely be competent to call other shareholders, to show that he applied to and got from them all their views respecting the situation of the company. In such a case the shareholders were obviously the best witnesses to speak to the facts connected with the second question here put to the jury. Accordingly, the respondent is not aware that any such objection as the present was ever attempted to be stated before. On this matter the law of England and of Scotland is the same; but if a question arose in any of the English courts respecting the sale of a few shares of any of the great mercantile companies, such as the Bank of England, Sun Fire Office, or even any of the later joint-stock companies, could an objection of interest be gravely stated in a trial respecting specific shares, if any of the conferences relative to the bargain were proposed to be proved by witnesses who had no connection with the parties, except holding other shares in the same extensive companies?

SYME  
v.  
BROWN.

12th May 1835.

The appellant of course will say, that the companies, in the case supposed, are not bankrupt, while the affairs of the Alloa Glass Company are in a state of deplorable wreck. Now, it is quite true that in one sense the Alloa Glass Company is bankrupt; that is to say, its stock and assets are very far short of the obligations and debts due by the company; but in another sense the company is redundantly solvent, as some of the wealthiest men in the city of

**SYME**  
**v.**  
**BROWN.**  

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**12th May 1835.**

Edinburgh are partners in it; so that all third parties will receive (and it is believed have received) payment of every farthing of principal and interest due by the company.

4. But, fourth, the bill of exceptions was properly disallowed, because enough was proved aliunde and exclusive of the witnesses objected to, in order to entitle the respondent to a verdict.

**LORD BROUGHAM.** — My Lords, I do not take the trouble of going through the arguments in this case. I am of opinion that the interest in this case is not that direct, and immediate, and substantial, and pecuniary interest which disqualifies the witness from giving evidence. I think the Court below have properly admitted his evidence, and that there are some Scotch cases referred to which afford a precedent for what has been done.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

**JOHN MACQUEEN — RICHARDSON and CONNELL, —**  
**Solicitors.**

[14th *May* 1835.]

**JAMES CORBETT PORTERFIELD, Appellant.—**

*Lushington—T. F. Ellis.*

**Mrs. JEAN PATERSON or HOWDEN'S TRUSTEES,  
Respondents.**

*Entail — Clause — Provisions to Children.* Under a strict entail containing clauses against contracting debts, &c., “ but excepting and reserving furth and from the said “ clause irritant full power and liberty ” to the heirs of tailzie “ to take on debts for the provision of their “ younger children, not exceeding three years free rent “ of the lands and others foresaid, after deduction of “ liferents and real debts,” &c. Held (affirming the judgment of the Court of Session), 1. That the heir in possession might grant provisions to his younger children to the extent of three years free rent, payable at the first term after the failure of heirs male of his body, when the lands should devolve on an heir not descended of him : And, 2. That the parties in right of the provisions might recover them from the heir in possession, with interest from the time the provisions fell due, although that heir was not descended from the grantor, and had not succeeded to the lands at the time the provisions became payable.

**I**N October 1721 Alexander Porterfield of Porterfield executed a deed of tailzie of the estates of Duchall, and other lands, in a contract of marriage between his son William Porterfield and Julian Steele.

By this deed he conveyed the lands to a series of heirs,—the heirs male of the body of the institute and

PORTERFIELD the heirs male of the body of the substitutes being pre-  
 v.  
 HOWDEN. ferably called as heirs of tailzie; and he prohibited  
 14th May 1835. selling, or granting infestments of annual rent, or any  
 security on the lands, or contracting debts, or doing  
 any other deed whereby the lands might be adjudged  
 or evicted, “excepting as is after excepted,” together  
 with the usual irritant and resolute clauses.

The exception here referred to was expressed in these  
 terms:—“And also, excepting and reserving furth  
 “and from the said clause irritant, full power and liberty  
 “to the said William Porterfield, and the heirs male of  
 “his body, or the others heirs male of the body of the  
 “said Alexander Porterfield, or the other heirs of tailzie  
 “above mentioned, to contract and take on debts for  
 “the provision of their younger children, not exceeding  
 “three years free rent of the lands and others foresaid,  
 “after the deduction of liferents and real debts, and the  
 “annual rents of personal debts.”

This was followed by a permission as to borrowing in  
 these words: “And also, to contract and take on, for  
 “just and necessary causes, the sum of 6,000 merks  
 “therewith, at least with as much of the said 6,000  
 “merks as shall be uncontracted, and the estate not  
 “affected with for the time, so that the debt to be  
 “contracted by them, and wherewith they may burden  
 “and affect the said lands, shall never exceed 6,000  
 “merks at one time, and three years free rent of the  
 “lands and others foresaid, after deduction of liferents  
 “and real debts, and the annual rents of personal debts.”

By a subsequent clause it was provided, “that if any  
 “apprising, adjudication, or other diligence shall be led  
 “and deduced against the said lands and others foresaid,  
 “or any part thereof, for the other provisions or sum

“ of 6,000 merks, wherewith the said William Porter-  
 “ field, and the heirs male of his body, and the other  
 “ heirs or members of tailzie above mentioned, have  
 “ power and liberty to burden and affect the foresaid  
 “ lands, as said is, then and in that case the heir of  
 “ tailzie who shall happen to bruick and possess the  
 “ said lands and estate for the time shall be bound and  
 “ obliged to purge the said diligences three years before  
 “ the expiry of the legal thereof, in case they shall  
 “ happen to succeed, or bruick, or possess the said  
 “ estate three years and six months before the expiry  
 “ of the said legal; and if they succeed or possess not so  
 “ soon, they shall be obliged to purge the same within  
 “ six months after their succession, or bruicking, or  
 “ possessing; and in case the same be not purged and  
 “ redeemed three years before the expiry of the said  
 “ legal, at least six months after the succession, or  
 “ bruicking, or possessing, the person so contravening,  
 “ and the descendants of his or her body, shall, ipso  
 “ facto, amit, lose, and tyne the right of the said lands  
 “ and others foresaid, with the pertinents.”

PORTERFIELD  
 v.  
 HOWDEN.

14th May 1835.

Alexander Porterfield, the entailer, died in 1743, and was succeeded by his son, William Porterfield. William died in 1752, and was succeeded by his nephew, Boyd Porterfield, who completed titles to the estate as heir of entail, and continued thereafter to possess the estate, in virtue of the above deed.

On the 14th April 1791 Boyd Porterfield, being then the heir of entail in possession of the entailed estates, executed a bond of provision, which commenced by specially narrating the deed of entail, and the power and liberty above mentioned, and then proceeded as follows :—“ And that I am resolved, in terms of the said

PORTERFIELD “ power and liberty, to burden the heirs succeeding to  
 v.  
 HOWDEN. “ me in my said entailed estates of Porterfield and

14th May 1835. “ Duchall with the payment of the provision herein-  
 “ after mentioned to my younger children herein-after  
 “ named, in case allenarly of the failure of heirs male  
 “ of my body, whereby the said lands and estate will  
 “ devolve upon an heir of entail not descended of me ;  
 “ and that by a rental of the said entailed estate, and  
 “ scheme of the debts affecting the same, signed by me  
 “ of the date hereof, and as relative hereto, it appears  
 “ that I have full power and liberty, in terms of the said  
 “ entail, to grant a bond of provision to my younger  
 “ children, to the extent after specified, do therefore  
 “ hereby bind and oblige myself, and my heirs of  
 “ tailzie succeeding to me in my entailed lands and  
 “ estate of Porterfield and Duchall, but with and under  
 “ the provision, declarations, and reservations herein-  
 “ after written, to pay to Mrs. Camilla Porterfield alias  
 “ Alexander, my third daughter, and wife of Boyd  
 “ Alexander of Southbar, Esq., and to Mrs. Christian  
 “ Porterfield alias Fothringham, my fourth daughter,  
 “ and wife of Frederick Fothringham, writer in Edin-  
 “ burgh, equally between them, and their heirs, execu-  
 “ tors, and assignees, the principal sum of 2,400*l.*  
 “ sterling, and that at the first term of Whitsunday or  
 “ Martinmas next after my death, in case I shall happen  
 “ to die without heirs male of my body, or if I shall  
 “ leave heirs male of my body, who shall succeed to me  
 “ in my said tailzied lands and estate, but shall there-  
 “ after fail, then at the first term of Whitsunday or  
 “ Martinmas next after the death or failure of the last  
 “ of the heirs male of my body ; together with 480*l.*,  
 “ money foresaid of penalty in case of failure, and the

“ legal interest of the said principal sum from the said PORTERFIELD  
 “ term of payment thereof, during the not-payment of v. HOWDEN.  
 “ the same.” The bond concluded as follows:—“ And 14th May 1835.  
 “ I farther declare, that these presents are over and  
 “ above any provisions already granted or to be here-  
 “ after granted by me to my said daughters, or their  
 “ said husbands, which will affect only my unentailed  
 “ estate and effects; and as I reserve full power and  
 “ liberty to me at any time of my life to revoke or  
 “ alter these presents in whole or in part, so I dispense  
 “ with the delivery hereof, and declare that these pre-  
 “ sents, though undelivered at my death, shall be  
 “ equally good and effectual, to all intents and purposes,  
 “ as if formally delivered by me, any law or practice to  
 “ the contrary notwithstanding; and for more security,  
 “ I consent to the registration,” &c.

By the rental of the estate, and a scheme of the debts affecting it, which accompanied this bond, it appeared that the sum of 2,400*l.* did not exceed three years free rent of the estate, in terms of the permissive clause of the entail.

Boyd Porterfield died in the year 1794, leaving an only son, Alexander Porterfield, and two daughters. Alexander succeeded his father in the entailed estates, and died in May 1815, without issue, and thereby the heirs male of the body of Boyd Porterfield failed. Thus the bond of provision became payable at the term of Martinmas 1815, being the first term after the death of Alexander Porterfield, the last heir male of the grantor's body.

Upon the death of Alexander Porterfield, the succession to the entailed estates became the subject of a competition between the appellant's father, the late

PORTERFIELD

v.

HOWDEN.

14th May 1835.

Mr. Corbett Porterfield, and the late Sir Michael Shaw Stewart; which was renewed by the appellant, Mr. James Porterfield, and the present Sir Michael Shaw Stewart, and gave rise to litigations which were not terminated till September 1831, when final judgment was pronounced in favour of the appellant, Mr. Porterfield.

In September 1832 the present action was raised against the appellant as heir of entail, concluding for payment of the principal sum of 2,400*l.*, with interest since Martinmas 1815.

The record having been completed, the Lord Ordinary pronounced an interlocutor in favour of the respondents.

Against this interlocutor the appellants presented a reclaiming note to the First Division of the Court of Session, on advising which their Lordships ordered Cases, and, on 17th June 1834, adhered.<sup>1</sup>

Mr. Porterfield appealed.

*Appellant.*—The question is on the construction of the bond of provision. The deed of entail of 1721 contains general and anxious prohibitions against contracting of debt, and these general prohibitions are only limited or qualified with a single exception or permission. The prohibition against contraction of debt is the general canon of the tailzie; and the heirs of entail are excluded from such contraction, unless in the particular case which forms the exception. It is for the respondents to show that this bond of provision was granted in conformity with the exception, and in the fair exercise of the power

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<sup>1</sup> 12 S., D., & B. p. 734.



thereby conferred; and this they have nowhere done. PORTERFIELD  
v.  
HOWDEN.  
14th May 1835.  
The exception or permission must be construed with reference, not only to the dispositive and other clauses in the deed, but more especially with reference to the terms of the prohibitory clause of which it forms a part. Besides being obviously framed contrary to the terms of the permissive clause in the entail, the bond is executed under mere cover of that clause, and in evasion of the entail. The bond of provision not having been granted in the fair exercise of, but having been made in evasion of, or being disconform to the permissive clause in the entail, it is completely ineffectual against the appellant as a subsequent heir of entail. At all events the appellant is not liable, under a proper construction of the entail, for any interest due upon the bond prior to his own succession as heir of entail.<sup>1</sup>

*Respondents.*—It is a general position in the law of Scotland, that entails are strictissimi juris, and the prohibitory, irritant, and resolute clauses contained in them are subject to the most rigid and unfavourable construction.

Where powers of making provisions for younger children are made exceptions from the prohibitory clauses of an entail, such powers are very favourably considered, and instruments exercised in favour of them are very liberally construed; both from the ordinary presumption in favour of liberty, and also from the natural duty and obligation incumbent on parents to make provision for their children.

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<sup>1</sup> *Appellant's Authorities.* — Thomson, 8 Dec. 1675 (Mor. 5939); Earl of Rothes, 29 Jan. 1829, (7 S. & D. 339); Kennedy, 11 Feb. 1829.

PORTERFIELD

v.  
HOWDEN.

14th May 1835.

The bond of provision is executed strictly in terms of the clause of reservation upon which it purports to proceed; and instead of exceeding the powers thereby provided to the grantor, it, on the contrary, falls short of those powers.

The appellant, as heir of entail in possession, is liable for the arrears of interest falling due upon the bond, both before and subsequent to his own succession.<sup>1</sup>

The House of Lords ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors therein complained of, be, and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

MONCRIEFF and WEBSTER — SPOTTISWOODE and  
ROBERTSON, Solicitors.

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<sup>1</sup> *Respondent's Authorities.*—4 Stair, t. 18, s. 6, 7; 3 Ersk. t. 8, s. 29; Halket Craigie v. Halket Craigie, 4 Dec. 1817 (F. C.); Sandford on Entails, 167; Macgill v. Macgill, 13 June 1798; Smollet, mentioned in a note to the Fac. Rep. (247) of the case of Wemyss v. Trail, 23 Nov. 1810; Crawford v. Holchis, 11 March 1809 (F. C.); Campbell v. Campbell, 29 Nov. 1815 (F. C.); Erskine v. Earl of Mar, 7 July 1829; Jardine v. Macdonald Lockart, 14 June 1833.

[15th May 1835.]

FREDERICK GYE and COMPANY, Appellants.—  
*Sir William Follett.*

SAMUEL JAMES HALLAM, Respondent.—*Blackburne—  
Bailey.*

*Arbitration — Clause — Expences.* An action of count and reckoning, concluding for 500*l.*, or such other sum as should be found to be the balance due, was judicially referred, with a declaration that the referee should ordain the losing party to pay all costs; and the referee found the pursuers entitled to 4*l.* 3*s.* 11½*d.* as the balance unaccounted for on transactions to the amount of 45,542*l.*, but declared the pursuers to be the losing parties, and liable in expenses. Held (affirming the judgment of the Court of Session) that the award was not ultra vires; but declaration added (by the House of Lords), that the judgment should not be drawn into a precedent on the general meaning of the words “losing party.”

IN April 1821 the respondent Hallam was engaged as a shopman to Messrs. Bish and Gye, tea-dealers in London, in whose employment he remained till June 1825. The present firm of Frederick Gye and Company having resolved to open some branch establishments, a proposal was made to the respondent of appointing him to be manager of one of them.

The respondent was in July 1827 sent to Edinburgh to take the management of a shop in Waterloo Place,

GYE &amp; Co.

v.

HALLAM.

15th May 1835.

which was opened by the appellants under the name of "The London Genuine Tea Company." No specific agreement was made as to salary, although the respondent was led to believe that it would be fixed at about 70*l.* a year. In consequence, however, of the confidence reposed in his integrity and abilities, as well as in consequence of the success of his exertions, it was agreed, in the course of the year 1828, that he should receive a salary at the rate of 80*l.* a year till October 1827, and that from that period it should be increased to 100*l.* a year, in addition to board and lodging.

Gye and Co. also sent from London three or four shopmen, in whose appointment the respondent had no voice. Early in the year 1829, a misunderstanding took place between him and one of these young men, in consequence of which the respondent wrote to Mr. Gye stating the circumstances, and mentioning that if this young man should not be removed, he would be obliged to leave his situation, as he could not remain with him. Mr. Gye removed this young man; but at the same time hinted that the respondent was taking too much upon him, and that he ought to consider all the shopmen as upon an equal footing with himself.

While matters remained on this footing, the establishment in Edinburgh more than realized the expectations of the appellants. It was more prosperous than any of their other branch establishments throughout Scotland, and they addressed many letters to the respondent, expressing their satisfaction with his conduct and success.

About the end of September 1829 Mr. Gye came to Scotland for the avowed purpose of making a general

visitation, and examining the stocks of the different establishments. On his arrival in Edinburgh, the whole books were carried from the shop to his apartments ; a balance of the cash was struck, and the stock on hand was taken, and compared with the invoices. It appeared that no deficiency in cash was discovered, and Mr. Gye expressed his satisfaction with the manner in which the business had been conducted.

GYE & Co.  
v.  
HALLAM.

15th May 1835.

In consequence of the control which the respondent had assumed over the other shopmen, complaints were made to Mr. Gye, who drew out a paper of instructions, the object of which was to put all the shopmen upon an equality ; to deprive the respondent of the authority which he had previously exercised ; and by dividing the responsibility among all, to make them a check upon each other.

These instructions set forth—" That it does not  
 " appear that the management of the concern was by  
 " any means placed on a proper foundation at the  
 " commencement, either as regards that satisfactory  
 " account which the principals ought to command at  
 " any moment, and to obtain without difficulty, or in  
 " respect to the internal arrangements with all those  
 " employed." It was also directed that the books, invoices, and papers should be open to all ; that the invoices should be examined by any two of them ; that the chests, when wanted, should be moved to the counter and marked off as such in the invoice ; that the letters from London should be opened by any one who might happen to be in the way ; and that the invoices and all letters, except such as were marked " private," should be accessible to all. And finally, " the term ' manager ' not to be used  
 " by any person in the establishment, and to be not in

GYE & Co. " future printed in any bill, card, directory, &c. All  
 v.  
 HALLAM. " are managers in their various departments, and the  
 15th May 1835. " principals look to their united exertions for the  
 " welfare of the establishment."

The proper duty assigned to the respondent was that of book-keeper or cashier. The sales were conducted by the other shopmen, who put the money received at the counter into the till; it was then taken out by the respondent in presence of one or more of them, and its amount was entered by him in the books of the company, after which he became answerable for it. The whole goods in the shop were open to all the shopmen alike. Each of them acted on the principle of the instructions, that he was a manager in his own department.

This led to misunderstandings; and a quarrel having taken place between one of these young men and the respondent, a letter seems to have been written to Mr. Gye on the subject, in which the respondent was charged with having violated the rules which Mr. Gye had prescribed. Mr. Gye wrote to the respondent on the 26th November 1829, intimating that a Mr. Tress was sent down to "take the command" from him, and requiring him immediately to deliver to Mr. Tress the keys of his desk and iron safe, with all their contents. He was farther required to take the stock with Mr. Tress, and to employ, at least, one of the young men to check it. Mr. Gye added, in his letter, "if you can point out  
 " any situation in our establishments likely to suit you,  
 " we shall be happy to hear from you, and to promote  
 " your interest in any shape in our power, except at  
 " Waterloo Place."

The respondent conformed at once to all the par-

particulars required by Mr. Gye, by delivering to Mr. Tress the keys of the desk and safe, with their contents, and by taking the stock. He was then discharged.

GYE & Co.  
v.  
HALLAM.  
15th May 1835.

It appeared that the amount of goods which passed through the hands of the establishment since its commencement in 1827 was 45,500*l*.

The appellants then raised an action of count and reckoning against the respondent, embracing a general accounting for his whole transactions from August 1827 till November 1829.

After the usual procedure an issue was directed in the following terms :—

“ It being admitted that during the years 1827, 1828,  
“ and 1829, the pursuers, Gye and Company, tea  
“ merchants in London, transmitted to Edinburgh  
“ certain quantities of tea, and employed the defender,  
“ along with certain other persons, to sell the same;  
“ and that the defender was employed to keep and did  
“ keep books, and did receive certain sums of money  
“ for the pursuers.

“ Whether the defender is indebted and resting  
“ owing to the pursuers in the sum of 120*l*., or any  
“ part thereof, as the value of stock not accounted for  
“ by him, or of monies received by him on account of  
“ the pursuers, and not accounted for ? ”

This issue was tried by a jury on the 24th March 1832, and the following verdict returned :—

“ Find for the pursuers to the extent of 84*l*. 19*s*. 3*d*.,  
“ being the amount of errors or omissions up to  
“ 30th September 1829.”<sup>1</sup>

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<sup>1</sup> 10 S., D., & B. p. 512.

GYE & Co.  
v.  
HALLAM.  
15th May 1835.

The respondent being dissatisfied with this verdict, made an application to the Court of Session to set aside the verdict: and on the 26th June a new trial was granted.<sup>1</sup> Soon after it had commenced, upon the suggestion of the Court, a minute of reference was entered into by the parties, in these terms: “ Gye v. Hallam.—The parties agree to withdraw a juror, and to refer the case to Mr. James Brown, accountant, whom failing, to Mr. Thomas Robertson, accountant; it being understood that the referee is not only to ascertain the balance due by the defender to the pursuers, if any, but also to settle all questions of liability; and that the losing party is to be ordered by the referee to pay all the costs.”

The referee, on the 17th January 1834, pronounced the following award:—

“ I, James Brown, accountant in Edinburgh, having accepted of the foregoing judicial reference, and having heard counsel for the parties at different times, and considered the parole proof adduced on behalf of the pursuers, with the whole written evidence for both parties, the account-books, and whole process, and having at different times issued notes and additional notes, and minutes containing my views on the various points brought under discussion, and having also considered the various pleadings, statements, and explanations given in for the parties respectively, and in answer to each other in the course of the reference, with the relative documents, am of opinion that the defender is liable to the pursuers for certain immaterial errors or omissions in the books which were

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<sup>1</sup> 10 S., D., B. & p. 710.



“ under his charge, and which he has failed to explain  
 “ to my satisfaction, amounting the said articles to  
 “ 4*l.* 3*s.* 11½*d.* sterling, on which sum I consider  
 “ interest to be due since the 30th day of November,  
 “ 1829 years. I think it fair to add that, keeping in  
 “ view the extent and magnitude of the business under  
 “ the defender’s charge, the errors and omissions above  
 “ alluded to are less in my opinion than might reason-  
 “ ably have been anticipated; and considering on the  
 “ whole matter the pursuers to be the losing party, I  
 “ order them to pay all the costs.”

GYE &amp; Co.

v.

HALLAM.

15th May 1835.

The respondent having moved the Court to interpose  
 their authority to the award, (which was opposed  
 by the appellants in so far as related to the finding  
 them liable in costs,) the Court (Second Division)  
 pronounced this judgment:—“ 18th January 1834.—  
 “ The Lords interpose their authority to the award pro-  
 “ nounced by James Brown, accountant in Edinburgh,  
 “ the judicial referee in this case, and decern in terms  
 “ thereof, and appoint the defender to lodge an account  
 “ of expenses, and remit to the auditor to tax the  
 “ same, and report.”<sup>1</sup> Thereafter, the 15th February  
 1834, the expenses were reported to amount to  
 693*l.* 16*s.* 8*d.*, for which, with the expense of ex-  
 tracting the decree, their Lordships decerned.

Against these interlocutors Gye and Co. appealed.

*Appellants.*—The parties are at issue upon a question as to the meaning of the reference in regard to ex-

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<sup>1</sup> 12 S., D., & B. p. 311.

GYE & Co.  
v.  
HALLAM.  
15th May 1835.

penses, and the competency of the award on that point. This question arises upon the part of the award, which closes in these terms “and considering on the whole matter the pursuers (appellants) to be the losing party, I order them to pay all the costs.” It is manifest from this, that he considered the decision of the point of expenses to be left to his discretion; and accordingly it is not upon the ultimate result, but on a view of the whole matter, that he decides it against the appellants. He appears to have been influenced by equitable considerations, the operation of which, as a ground of decision, it was a leading object of the reference altogether to exclude.

But the minute of reference clearly constitutes the measure of the referee's powers. It is a judicial contract between the parties, and it was ultra vires of the referee to exercise any power not specially conferred on him by that contract.

The question of accounting is referred generally; but that of expenses is not so. The minute expressly bears “that the losing party is to be ordered by the referee to pay all the costs.” Thus nothing is left to the discretion of the referee. Expenses are to follow his judgment on the merits, and the party against whom that judgment goes forth is to be ordered to pay expenses. Whether this was a wise or a prudent arrangement is not the question, but whether such an agreement was truly entered into by the parties. They were at issue upon a matter of accounting, which might afford ground for protracted litigation. To prevent this, the parties agreed to take away all discretion from the referee upon the subject of expenses; and this was done by intro-

ducing into the reference a substantive declaration that  
“ the losing party should be ordered by the referee to  
“ pay all the costs.”

GYE &amp; Co.

v.

HALLAM.

15th May 1835.

But while the referee has, upon the question of accounting, or, more properly, the issue of resting owing, returned a verdict for the appellants, finding that the respondent is indebted to them in the sum of 4*l.* 3*s.* 11½*d.* with interest from the 30th November 1829, he has found the party against whom the issue of resting owing has been decided, and who consequently is the losing party, entitled to full expenses. The referee assumes that he had power to decide who was to be considered the losing party, without regard to the fact that decree has been issued against the respondent for a particular sum, with interest, as due to the appellants. Accordingly the ratio of the judgment appears to be, that, as upon the whole the appellants will gain so little by their decree, they must be held substantially to have lost their cause. On the same principle the referee might have held that where 120*l.* was demanded, an award for 30*l.* or 40*l.* was not sufficient to make the appellants the gaining party, to the effect of entitling them, under the reference, to an order upon the respondent to pay costs. But this would be an exercise of that discretion on the part of the referee which it was the purpose of the reference to take away. The parties agreed that expenses should follow a judgment in favour of either of them, without regard to the amount to be recovered by the appellants, and in order to give effect to this agreement the condition was inserted in the reference requiring the referee to order the losing party to pay all the costs.

GYE and Co.  
v.

HALLAM.

15th May 1835.

If, then, the referee has exceeded his powers in ordering the appellants to pay costs, it follows necessarily that the judgments appealed from, interponing the authority of the Court to the award, and decerning for a large sum of expenses against the appellants, must be reversed.

*Respondent.* —It was not only the object of the reference that the whole points on the merits in dispute between the parties should be exhausted, but that the question of expenses should be disposed of by him. He was “to settle all questions of liability;” after which there follows the provision, “that the losing party is to be ordered by the referee to pay all the costs.” It is therefore undoubted that the question as to liability for expenses was embraced by the reference, and consequently it cannot be maintained that the referee has exceeded his powers in disposing of that question.

Assuming this to be clear, it necessarily follows that the referee was fully empowered to determine who should be considered the “losing party.” To maintain that this power was not vested in him is to maintain the absurdity that the referee should order the party to pay the costs, not whom he himself, after a due investigation of the claims should hold to be the losing party, but whom the Court of Session or this House should ultimately determine to be so.

The present discussion thus resolves itself simply into a question as to his power to say who was the losing party. If it was within his power to fix who was the losing party, the mode in which he has exercised that

power is foreign to the inquiry. Now, it was either within his power, or it was not. If it was, then the discussion is at an end, for he has said that the appellants were the losing party. But if it was not within his power, then it must be held to have been vested in some other tribunal, and consequently it was not competent for the referee to pronounce any award in favour either of the respondent or of the appellants, without obtaining, in the first instance, from such tribunal the warrant for his award. It cannot be said that he was only entitled to award costs against the losing party, so long as his opinion coincided with what might be formed by the Court of Session, for this would virtually be holding that he had no power in the matter. Unless, therefore, the appellants are prepared to concede the question of power, they are driven to the absurdity of maintaining that the question of liability was reserved by the Court, while merely the duty of embodying the finding of the Court in his award was entrusted to the referee.

GYE and Co.

v.

HALLAM.

15th May 1835.

Indeed, if the construction attempted to be put on the minute by the appellants is well founded, it would not have been competent for the referee to award expenses against the respondent, even if he had seen cause to do so. In that case the respondent would have been entitled to contend that he was not the losing party, and that the referee had arrogated a jurisdiction to himself which the parties had never conferred on him. Such a plea, if sound, would be just as available to the one party as to the other. Yet it cannot be available to both, except on the notion that the jurisdiction of the referee was absolutely and intentionally excluded, a proposition which cannot be maintained.

GYE & Co.  
v.  
HALLAM.  
15th May 1835.

No doubt the terms “ the losing party,” are vague and general, but they are sufficiently explicit to express the meaning of the parties. The referee was not entitled to take an intermediate course, by finding neither party liable in expenses to the other. He was bound to consider who was to be held the losing party, with reference to the whole proceedings from their commencement to their close. Let, then, the relative claims of the parties be looked at in this light. The appellants raised a general action of count and reckoning—they condescended on certain large claims against the respondent, which they altered at the different stages of the proceedings; and, finally, they obtained a decree for a sum which, comparatively speaking, is trifling and insignificant; and which was even below what was originally offered to them for a compromise. Their action therefore was, in the first place, unnecessary and uncalled for; and, in the next, they have failed to establish the leading points of their claim.

LORD BROUGHAM:—My Lords, it will be a most unfortunate thing indeed, if, upon further considering the proceedings in this case, which took place in the Court below, I should be of opinion that I ought to advise your lordships to send this case back to the Court below,—that is, that the judgment of that Court should be reversed, which interposes the authority of the Court, in order to give validity to the decision of the arbitrator, because it cannot end here, but the dispute will continue between the parties, and the inevitable result must be that which I will point out (it is impossible to be otherwise). The argument of the appellant here is, that the arbitrator had not the power

to exercise any discretion upon the costs, and that he had no right to order the costs of the defender to be paid by the pursuers. They who are counsel for the appellants say it is quite unnecessary for them to contend on their behalf any thing further than that, for that is sufficient, they say, to set aside the judgment of the Court, which validates the award of the arbitrator, and confirms it. For, say they, it is unnecessary for us to go further than to show that the arbitrator exceeded the bounds of his authority, by directing us, the appellants, to pay the costs. But, nevertheless, it is perfectly clear, that though that may be sufficient to carry them through, and enable them to obtain a reversal of this judgment, they have no ground upon which to prevail, by the force of their argument, on the construction of the reference of the award, without prevailing a great deal further. They have just as good a right to take the second step, which they do not now take, as to take the first step which they are now taking. They have as good a title to have the arbitrator's hands tied up, and the Court to say the arbitrator ought to have directed the costs to be paid by the defender to the pursuers, as to say that he had no authority, inasmuch as his hands were tied up, and he ought not to have ordered the costs to be paid by the pursuers. No distinction can be taken between the two parts of the argument, and what is good for the argument upon the one case is as good upon the other. Now, my lords, of this I am quite clear, that if this case goes back to the Court of Session, unless their lordships shall have changed their opinion, they have but one course to take. The Court below distinctly state, and all the judges in one voice say, (the arbitrator, indeed, may be a different man, if it goes to

GVE & Co.  
v.  
HALLAM.  

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15th May 1835.

GYE &amp; Co.

<sup>v.</sup>  
HALLAM.

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15th May 1835.

arbitration again, and that therefore signifies less, but all the learned judges say,) not only that the costs must not be paid by the defender to the pursuers, but that the defender has a right to be paid the costs by the pursuers; and they have the discretion in their breasts, and they alone have the discretion, whether it goes to a jury or to an arbitrator, upon the question of costs, unless the hands of the arbitrator be voluntarily tied up by the terms of this submission; that is clear. Now, is there any likelihood that the learned judges will alter that clear opinion which they have arrived at? No; because nothing that has been said here will make them alter that opinion; for nothing can be said here to indicate that they were wrong upon the subject. On the contrary, if I look into this case, I am of opinion that their lordships are perfectly right in determining, that if the arbitrator's hands were not tied up by the terms of this submission, the costs ought to be paid by the pursuers to Mr. Hallam. Therefore, as far as any thing here takes place, whatever opinion may be arrived at, the opinion of the Court taken will be further confirmed, rather than altered, by any thing that passes here. What, my lords, is the consequence? This that has been done may be set aside; but Mr. Hallam, the respondent, if this case is to go back, will find (what any man of common sense will find necessarily) that he must not make any more slovenly references; perhaps he will find it better not to make a reference to any unlearned tribunal, and that the case will go to be tried before a new jury, and the probability is, that it will be attended with the same result; but he will take care not to tie up the hands of the arbitrator, and to make the costs abide the event, because he knows that if he refuses



to make that a part of the submission (and no man can compel him to do it), he will leave the costs in the discretion of the Court, which has expressed its opinion (and is still further confirmed in its opinion by what has passed here) that he has the right to his costs, whatever be the event of his reference. Therefore, if there be, as we must suppose there is, any sense left in him, and the reference has not confused his senses, he will not tie up the hands of any new arbitrator ; consequently, it must in the end come to this, that in all probability the same sum will be found due, and the same result will take place, after the arbitration which has taken place already. This, my lords, is what makes me consider that it would be an unfortunate thing if, upon the construction of this slovenly instrument, I were to say, that I differ from the Court below, and were to recommend your lordships to reverse the decision. Nevertheless, we must do what the law requires ; and I am by no means prepared to say, that I can agree with that construction (I will not say extraordinary construction), as at present advised, of this instrument. It certainly does seem very strong to say, that this is other than referring it, with the costs to abide the event. They refer it to the arbitrator, to ascertain, first, whether any balance is due ? secondly, if any, what is due ? and, thirdly, they agree that he shall order that he who is found against shall pay the costs of the whole proceeding. That is *primâ facie* the construction of this instrument ; but if I can find any means, under the peculiar circumstances of this case, of getting out of this construction, I confess that I shall most readily adopt that course. I shall upon no account advise your lordships to make these appellants pay the costs of this appeal ; on that the respondent must lay his

GYE & Co.  
v.  
HALLAM.  
15th May 1835.

GYE & Co.  
v.  
HALLAM.  
15th May 1835.

account, because, though he may say that he has suffered by this litigation in the Court below, and that it is a great hardship upon him to have to pay his costs in this appeal if your lordships affirm the decision of the Court below, yet whose fault is that? It is his own fault, and he has himself or his adviser in Scotland to blame for choosing to do that which has led to this appeal; for choosing to put those words upon the face of this submission, which seem to be liable to one construction when they are liable to another. He cannot expect, therefore, to get the costs in this appeal, whatever be the result; but my endeavour will be, for the reasons I have given, if I possibly can, to recommend your lordships to affirm the decision, which, if it be reversed, will only lead (that is a matter mathematically demonstrable), and can only lead to precisely the event which has already been arrived at, namely, the balance of 4*l*.; the Court will find against Mr. Hallam, and direct the costs to be paid to Mr. Hallam, in reference to the circumstances of this vexatious litigation. When I say that I have great difficulty in following the construction taken by the Court below, my difficulty arises from this: at first I was apt to think that "liabilities" would have carried us through, and if I thought that that argument was quite conclusive, and was capable of no answer, I think it would carry us through, because the items upon which this decision has gone against Mr. Hallam not appearing, the 500*l*. being a general sum, and its being possible that those items, though they might be parcel of the 500*l*., yet might not be parcel of the 500*l*., I think that possibility would have been a sufficient ground upon which to hang this decision of the Court below confirming the award in

respect of this construction; that is, suppose I could arrive at the construction of the liabilities being referred; but I am afraid that is not the case, because there are two things referred: first, was any thing received which has not been accounted for by Mr. Hallam? and if any thing was received, was he liable to account for that, though he may not have accounted for it? And I am not left to conjecture that that may have been the case in the minds of the parties, because the pleadings show that those points were both raised, and severally raised, and that he defended himself in two ways: first, by proving receipt and proving the discharge to be one and the same thing; and, secondly, admitting that there is a receipt, and no discharge for that receipt, by contending I am not liable. That, my lords, is my present impression. I wish, however, for time to consider that, as well as other matters; among others the 6*l*., which at present I think is displaced; but I shall look into that matter with the disposition that I have stated, to strain a point, if I can, in favour of the decision of the Court below.

GYE &amp; Co.

v.

HALLAM.

15th May 1835.

LORD BROUGHAM on a subsequent day said:—My lords, I would call the attention of your lordships to the case of Gye v. Hallam; one of as great perplexity in one respect, and of as much hardship on the part of the respondent, if your lordships should be under the necessity of reversing the judgment, as I think I have ever seen in this House; because it is perfectly clear that there was an oversight in the submission or reference. It is quite clear that the arbitrator intended to find that Hallam was the winning party, and that Gye was the losing party; and it is equally clear that the Court

**GYE & Co.** below, in whose breasts the whole consideration of costs  
**v.**  
**HALLAM.** rests, intended that Gye should not have his costs paid  
15th May 1835, by Hallam, but that Hallam should have his costs paid  
to him by Gye, though a small sum of money was  
awarded by the arbitrator to be paid by Hallam to Gye;  
but it is unfortunately the case, that, according to the  
strict use of the words, "the losing party" must be the  
man who has the sum of 4*l.* 1*l.* 3*d.*, or some such sum  
of money, awarded against him. But then, my lords,  
we ought to consider what will be the consequence if  
you reverse this judgment, and send the case back:  
the litigation will be endless. This arises out of the  
reference of the costs to the arbitrator. Supposing a  
reference to be made again, more care may be taken in  
getting the terms of the reference, but still the result  
will most probably be the same,—that Hallam shall not  
pay Gye's costs, but the contrary. It is clear that Gye  
is at Hallam's mercy as to the terms of submission, and  
if he will not submit to refer on Hallam's terms, as  
regards the costs, he goes before a jury. Suppose the  
jury find a verdict for the same amount for which the  
arbitrator made his award, the jury will have no  
discretion as to costs, any more than the arbitrator.  
Then it comes back to the Court of Session; the Court  
of Session alone has dominion over the costs. Now the  
Court of Session has already given their opinion, that  
the award was right; and that is known. The case  
would not go to the other Division of the Court; it  
must go back to the same Division, where at once the  
same opinion will of course be given. So that if the  
appellants recovered by the verdict, because the respon-  
dent would not agree to submission, without leaving the  
costs to abide the event, though they got a verdict for the

same sum for which they had an award before, that would not give them one farthing of costs ; and one should regret if it did, in a case where, on a minute investigation into transactions to the amount of 40,000*l.*, there has been an error to the extent only of 4*l.* This, my lords, being the case, though I am perfectly clear that, in the construction of those words, “ the losing party ” was the party against whom the sum was awarded, I am of opinion that I ought to advise your lordships to affirm this interlocutor, with a declaration ; that declaration being, that, in the peculiar circumstances of this case, your lordships felt it to be right that it should be affirmed, but that it should not be drawn into a precedent, as to the import of the words “ the losing party,” in other cases of a dissimilar description in point of circumstances, lest a reference to this case, without attention to its peculiar circumstances, should lead to an incorrect result. With that guard, and with the security arising from that guard, so that there can be no false construction put upon this decree, I am of opinion your lordships will do well to affirm it. I shall prepare myself the words of that declaration ; for it is highly necessary to show that these slovenly references are exceedingly injurious to the parties, as they lead to excessive litigation, interminable expense, and that they are very hard upon the Court as well as upon the parties. Of course there must be no costs here.

GYE & Co.  
v.  
HALLAM.

15th May 1835.

The House of Lords ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors therein complained of be, and the same are hereby affirmed : But this House thinks fit to declare, That this order is made upon consideration

GYE & Co.  
v.  
HALLAM.  
—  
15th May 1835.

of all the peculiar circumstances of this particular case, and that it is not to be drawn into a precedent as authorizing the inference that a submission to arbitration, where the parties agree that the arbiter shall order the losing party to pay the expenses, either leaves the quantum of expenses in his discretion, or leaves it to him to determine that any one is the losing party other than the party against whom he makes his decret arbitral upon the merits of the case, to any amount.

TILSONS, SQUANCE, and TILSONS — JAMES PATTEN —  
Solicitors.

[15th May 1835.]

**WILLIAM JEFFREY**, Trustee on the Sequestrated Estate of **ARCHIBALD CUTHILL**, Appellant.—*Lushington — Stuart.*

**HENRY PAUL**, Respondent.—*Knight—A. M'Niel.*

*Trust—Bankrupt—Sequestration—Heritable Bond*—Three trustees, to whom certain heritable subjects had been conveyed, with a power of sale, in relief of obligations undertaken by them, having, in a disposition of part of the subjects, granted in their character of trustees, declared 3,000*l.* of the price to be a real burden, and afterwards taken a bond for that sum, payable to them *privatis nominibus*, their heirs and assignees, but without discharging the real burden; having taken a bond for 400*l.* (part of the price of a second portion of the trust subjects), as for cash instantly advanced, payable to them *privatis nominibus*, their heirs and assignees; but having taken a bond for 1,925*l.*, part of the price of a third portion of the subjects, payable to them in their character of trustees; on all of which bonds infestments followed; and one of the trustees having thereafter been sequestrated, and an action of adjudication having been brought by the solvent trustees, to have the three bonds adjudged to them in extinction of the outstanding obligations of the trust, and in order to equalize the superadvances made by them, which greatly exceeded the advances made by the bankrupt trustee:—Held, 1. (reversing the judgment of the Court of Session), that the creditors on the sequestrated estate of the bankrupt trustee were entitled to a third of the 400*l.* bond, as appearing on the face of the records to have been vested in the bankrupt and his co-trustees *privatis nominibus*. 2. (affirming the judgment of the Court of Session), that

the bonds for 3,000*£* and 1,925*£* fell to be applied, in the first place, in extinction of the outstanding obligations of the trust-estate, and in the second place, in relief of the superadvances of the solvent trustees.

2<sup>d</sup> Division.  
 Ld. Mackenzie.  
 —  
 15th May 1835.

**I**n the year 1816, William Harley of Willowbank near Glasgow became insolvent, and compounded with his creditors. With the view of securing the cautioners for his composition, he executed a trust disposition of his property in favour of several persons. Thereafter, in December 1819, Harley and his trustees disposed in favour of himself, James Cook, John M'Gavin, Thomas Graham, Archibald Cuthill, and Robert Moffat, and the survivors and survivor of them, all his heritable and moveable estate, “ in trust, for the purpose of our said  
 “ disponees and their foresaids selling, feuing, or other-  
 “ wise disposing of the whole of the said property, or such  
 “ parts thereof as they may think proper, absolutely and  
 “ irredeemably, either by public roup or private bargain,  
 “ for such prices as they may think proper to accept of,  
 “ and that with or without the consent or concurrence of  
 “ the said William Harley, and for the purpose of borrow-  
 “ ing such sums of money as can be obtained on the  
 “ security of the said lands, and granting heritable bonds  
 “ and dispositions in security for repayment of the same,  
 “ and applying the proceeds in payment of the expense  
 “ and charges incurred or to be incurred by them in the  
 “ premises, in payment of all advances and obligations  
 “ already come under by them, or any or either of them,  
 “ in relation to said properties or to the affairs of the said  
 “ William Harley, and to pay over the balance to the  
 “ said William Harley, or his heirs or disponees.”

In the year 1820, Mr. M'Gavin retired from the trust, and was succeeded by the respondent Henry Paul,



accountant in Glasgow, who was also appointed factor for the trust, and superintendent of the trust affairs. In the year 1821 the estates of Mr. Graham and Mr. Moffat were sequestrated, and in February 1822 those of Mr. Harley were also sequestrated. Thus, at the latter date, the solvent trustees were Mr. Cook and Mr. Cuthill, who were personally liable in all the trust obligations, and Mr. Paul, the professional trustee, to whom Messrs. Cook and Cuthill had become personally bound in relief of all obligations undertaken or to be undertaken by him on account of the trust.

JEFFREY

v.

PAUL.

15th May 1835.

In July 1822, Messrs. Cook, Cuthill, and Paul, “as  
 “ trustees foresaid, and as such vested in certain lands and  
 “ others, for the purpose of selling or otherwise disposing  
 “ of the same, agreed to sell, and do hereby bargain and  
 “ sell to Hamilton William Garden” certain trust subjects,  
 at the price of 15,500*l*. They were to receive payment  
 of this sum in houses to be built by Mr. Garden upon  
 part of the ground purchased by him, which houses were  
 to be transferred to them at a valuation. He built  
 houses accordingly, which were taken from him pro tanto  
 of his purchases. But, for 3,000*l*. of the price which he  
 had engaged to pay, Mr. Garden granted his promissory  
 note to Messrs. Cook, Cuthill, and Paul, and that  
 sum was to be declared a real burden on his purchases.  
 This was done in a disposition in favour of Mr. Garden,  
 granted by Messrs. Cook, Cuthill, and Paul, who were  
 there described as “ the only acting trustees for the  
 “ creditors of William Harley,” with consent of Harley  
 and his judicial trustee, and of Messrs. Graham and  
 Moffat, “ nominated, but not now acting as trustees for  
 “ the creditors of the said William Harley.” Some months  
 after Mr. Garden received this conveyance, he, on the

JEFFREY  
 v.  
 PAUL.  
 15th May 1835.

narrative that he had “ borrowed, and actually received  
 “ from James Cook, civil engineer in Glasgow, and Archi-  
 “ bald Cuthill, writer there, the sum of 3,000l.  
 “ sterling,” granted a bond for that sum, and a disposition  
 in security over the heritable property, on which infest-  
 ment followed in favour of “ the said James Cook and  
 “ Archibald Cuthill, and their heirs or assignees, and the  
 “ survivor of them, in trust for the heirs of the prior de-  
 “ ceaser.” This bond was granted solely in consequence  
 of Mr. Garden not having discharged the 3,000l. which  
 had been declared a real burden on the same property.

Of the houses which had been received by the trustees  
 from Mr. Garden, in part payment of his purchases, one  
 was sold to William Ewing for 400l., being part of the  
 price, who on 6th September 1825, granted a bond and  
 disposition in security, on which infestment followed.  
 The inductive clause and the personal obligation are in  
 these terms:—“ Know, &c.—I, William Ewing, merchant  
 “ in Glasgow, grant me instantly to have borrowed and  
 “ actually received from James Cook, civil engineer in  
 “ Glasgow, Archibald Cuthill, writer there, and Henry  
 “ Paul, accountant there, the sum of 400l. sterling,  
 “ whereof I do hereby acknowledge the receipt, renouncing  
 “ all exceptions to the contrary ; which sum of 400l. ster-  
 “ ling, I, the said William Ewing, bind and oblige me, my  
 “ heirs, executors, and successors, to repay to the saids  
 “ James Cook, Archibald Cuthill, and Henry Paul, and  
 “ their heirs or assignees, and the survivors or survivor of  
 “ them, in trust for the heirs of the prior deceiver.”

It will be observed that the above bond for 3,000l. and  
 the bond for 400l. was taken to the parties not as trustees  
 but as individuals. They were, however, prepared by  
 Mr. Cuthill, who was a writer, and the entries in his

books clearly established that they were for behoof of the trustees. In 1826, these trustees sold Mr. Garden certain subjects at Enoch Bank, belonging to Harley's trust, for 1,152*l.* 6*s.* On an accounting between the trustees and Mr. Garden for this and his former purchases, he was found to be indebted to the trustees in 1,927*l.* 0*s.* 1*d.*, for which he granted bond and disposition in security, whereby he acknowledged "to have instantly  
 " borrowed and actually received from James Cook, civil  
 " engineer in Glasgow, Archibald Cuthill, writer there,  
 " and Henry Paul, accountant there, only acting trustees  
 " for the creditors of William Harley, the sum of 1,925*l.*,  
 " and bound himself to repay the same to the said James  
 " Cook, Archibald Cuthill, and Henry Paul, trustees  
 " foresaid, and their assignees, and to the survivors or  
 " survivor of them, and to their or his assignees."

JEFFREY  
 v.  
 PAUL,  
 15th May 1835.

In the same year, and after these deeds were perfected by recorded sasine, Mr. Cuthill became insolvent and absconded. He and Mr. Cook being personally liable in all the trust obligations, had, on that account, paid large sums out of their own funds. In a state of these advances, Mr. Cuthill's advances, at and prior to 24th May 1825, are entered at 6,826*l.* 0*s.* 7*d.*; and Mr. Cook's advances down to the same period amounted to 9,414*l.* 2*s.* 6*d.*, exclusive of which he is also stated to have advanced, since 24th May 1825, 8,545*l.* 9*s.* 2½*d.*, making the total of Mr. Cook's advances, 17,959*l.* 11*s.* 8½*d.* Together, 24,785*l.* 12*s.* 3½*d.*

But these advances, it was alleged, were not adequate to pay the trust deficiencies; in particular it was stated, that not only was Mr. Paul in advance for the trust to the amount of 2,745*l.* 7*s.* 4*d.* exclusive of interest, and his allowances for commission and trouble, but that

JEFFREY  
v.  
PAUL.

15th May 1835.

there were also other trust debts outstanding, to the amount of 6,693*l.* 2*s.* 9*d.*, exclusive of interest.

Under these circumstances Messrs. Cook and Paul brought an action before the Court of Session in which they set forth, That, by the arrangement under which the said Henry Paul became one of the trustees for the creditors of the said William Harley, all the other trustees bound themselves, jointly and severally, to free and relieve him of all sums to be advanced, and engagements to be come under by him, in that character: That the sums which have been already advanced by the pursuer, James Cook, from his own private funds, towards payment of the debts and obligations owing and undertaken by him and the other trustees for the creditors of the said William Harley, amount to 17,000*l.* sterling, or thereby; while the advances which have been made by the said Archibald Cuthill, towards payment of the said debts and engagements, only amount to between 8,000*l.* and 9,000*l.*: That the sums still due to the creditors of the trust, and for which the pursuers and the said Archibald Cuthill, as trustees foresaid, have come under engagements, and are responsible as aforesaid, amount to 12,000*l.* sterling, or thereby, and greatly exceed the total amount and value of the trust estate of the said William Harley, still remaining vested in the pursuers and the said Archibald Cuthill, as aforesaid, including the amount of the sums contained in the three bonds and dispositions in security before narrated; and there will be an enormous deficiency and loss, which must be borne by the said trustees, in manner foresaid: That, in or about the month of February 1826, the said Archibald Cuthill having become insolvent, he absconded from Scotland;

and about, or soon after that time, he was rendered notour bankrupt, and he has not since returned to this country: That the said Archibald Cuthill is bound to relieve the pursuer, James Cook, and to make payment to him of one half of the difference between the amount of the said advances by the said pursuer and the amount of the smaller advances made by the said Archibald Cuthill, as aforesaid, in order to equalize the advances made by them respectively; and the said Archibald Cuthill is also bound, jointly and severally with the said pursuer, to relieve the other pursuer, Henry Paul, of the whole amount of the sums still due to the creditors of the trust, as aforesaid; and he is likewise bound to relieve the pursuer, James Cook, to the extent of one half of the said sums still owing: That the said Archibald Cuthill is further bound to concur in uplifting and discharging the said bonds, in order that the proceeds may be applied towards extinction of the foresaid obligations come under by the pursuers and him the said Archibald Cuthill, as trustees foresaid: And although the pursuers have frequently required the said Archibald Cuthill so to relieve and make payment to them respectively, and to concur with them in granting assignations and translations of the said bonds, or discharge thereof, in order that the sums therein contained might be applied towards extinction and relief of the obligations come under by the pursuers, as trustees foresaid, yet he refuses, or at least delays so to do: That the foresaid sum of 3,000*l.* sterling, and interest thereof, were constituted a real burden, as aforesaid, in favour of the pursuers James Cook and Henry Paul, and the said Archibald Cuthill; and the said three bonds and dispositions in security were granted, the first to the pursuer James

JEFFREY  
v.  
PAUL.

15th May 1835

**JEFFREY****v.****PAUL.**

15th May 1835.

Cook and the said Archibald Cuthill, and the two others to the pursuers James Cook and Henry Paul, and the said Archibald Cuthill, all as trustees for the creditors of the said William Harley; and the pursuers are legally entitled, when the sums therein contained are recovered, to apply the same towards payment of the sums advanced, or for which they have become bound as trustees foresaid respectively, and towards equalizing the amount of these sums with the smaller amount of advances made by the said Archibald Cuthill in that character: And in order that the pursuers may be enabled to recover and receive the said several sums contained in the said bonds and dispositions in security, and to grant assignations and translations, or discharges and renunciations thereof, and of the lands thereby disposed in security of the said sums respectively, and also of the foresaid real burden, and that they may thus be enabled to relieve themselves pro tanto of the sums advanced or for which they have become bound as trustees aforesaid, with the interest due and to become due thereon, it is necessary that decree should be pronounced in the terms following: Therefore it ought and should be found and declared, by decree of our Lords of Council and Session, that the pursuers, the said James Cook and Henry Paul, have, in the manner before stated, the only good and undoubted right and title to the foresaid principal sum of 3,000*l.* sterling, with interest thereon and penalties, created a real burden by the foresaid disposition granted by the pursuers and the said Archibald Cuthill, with consent foresaid, to the said Hamilton William Garden, and contained in the foresaid bond and disposition in security first above narrated, granted by the said Hamilton William Garden to the pursuer James Cook, and the

said Archibald Cuthill ; also to the foresaid principal sum of 400*l.* sterling, interest and penalties, contained in and due by the foresaid bond and disposition in security granted by the said William Ewing to them and the said Archibald Cuthill ; and also to the foresaid sum of 1,925*l.* sterling, with interest and penalties, contained in and due by the said other bond and disposition in security granted by the said Hamilton William Garden to the pursuers and the said Archibald Cuthill as aforesaid ; and likewise to the lands and others over which the foresaid real burden is constituted, and the lands and others conveyed in security of the said sums respectively by the said bonds and dispositions in security, as the said lands are herein-after particularly described ; together with the said real burden, and the said bonds and dispositions in security themselves, and instruments of sasine following thereon, and other writings and title deeds of the premises, and rents, mails, and duties thereof ; and that the pursuers are entitled to have feudal titles made up to the said lands and others, so as to divest the said Archibald Cuthill of any title *ex facie* standing in him, and to vest the same completely in the pursuers' persons, in security of the foresaid sums, and for the purposes mentioned in the foresaid disposition by which the said real burden was constituted, and in the said bonds and dispositions in security respectively : And it ought and should further be found and declared, by decree of our said Lords, that the pursuers have the sole and undoubted right and title to uplift and discharge the sums constituted a real burden by the disposition to the said Hamilton William Garden first above mentioned, and contained in the said bonds, and to renounce, resign, and discharge the real burdens and heritable

JEFFREY  
v.  
PAUL.

15th May 1835.

JEFFREY  
v.  
PAUL.  
15th May 1835.

securities thereby created, and also to assign, dispo-  
and convey the said real burden, and the said bonds  
and whole heritable subjects therein contained and real  
security thereby created. And in order that the pur-  
suers may be completely and feudally vested in the  
foresaid several sums, and in the said several subjects  
held by them in security thereof, and to which they have  
right as aforesaid, and in conformity to the laws and  
daily practice of Scotland, the said several sums, prin-  
cipal, interest, and penalties, constituted a real burden  
as aforesaid, and contained in and due by the foresaid  
bonds and dispositions in security respectively, and the  
foresaid bonds and dispositions in security themselves,  
and infeftments thereon, and also the lands and others  
thereby conveyed in security of the said sums respec-  
tively,—they then further concluded, that these bonds,  
with the subjects therein specified, ought and should  
be decerned, declared, and adjudged to pertain and  
belong, heritably, but redeemably, and under reversion  
to the pursuers, their heirs and assignees whomsoever, as  
having right to the same in manner foresaid, and to  
establish valid and sufficient feudal titles thereto in their  
persons.

Defences were lodged by Jeffrey, the trustee in  
Cuthill's estate, in which he maintained, 1st., that as the  
bonds for 3,000*l.* and 400*l.* were taken in favour of  
Cuthill as an individual, and appeared so on the record  
of sasine, he, on behalf of the creditors, was entitled to  
the benefit of it to the extent of Cuthill's share, and the  
alleged trust was of no relevancy in a question with  
him; 2d, that at all events these bonds must be held to  
have been granted in liquidation pro tanto of the re-  
spective advances by the parties; and as those by Cuthill



exceeded the amount of his share, it was not competent to appropriate the securities to the relief of the alleged superadvances by Cook ; and 3d, that there was no evidence of such superadvances by Cook.

JEFFREY

v.

PAUL.

15th May 1835.

The Lord Ordinary pronounced this interlocutor:—“(8th March, 1831.)—The Lord Ordinary  
 “ having heard parties’ procurators, and thereafter considered the closed record and whole process, finds no  
 “ ground stated on which the pursuers can be found  
 “ entitled to more than a rateable share in the funds  
 “ libelled, in proportion to the amount of the money  
 “ advanced or debt undertaken by the pursuer James  
 “ Cook on account of the trust estate libelled, as compared to the money advanced or debts undertaken  
 “ for the said estate by Archibald Cuthill ; and therefore  
 “ finds that effect cannot be given to the conclusions of  
 “ the present action, and dismisses the same, and decerns.  
 “ Finds no expenses due to either party.”

Against this interlocutor both parties presented reclaiming notes (Jeffrey, in so far as it was unfavourable to his pleas, and denied him expenses,) to the Second Division, who ordered the question to be argued in cases, on advising which they pronounced this interlocutor:—“(29th November 1831.)—Recal the  
 “ interlocutor complained of, sustain the present action,  
 “ and remit to the Lord Ordinary to hear parties as to  
 “ the amount of the pursuers’ advances in regard to the  
 “ affairs of William Harley, referred to in the summons  
 “ and pleadings, and to proceed further thereanent as  
 “ to his Lordship shall seem just. Reserving to both  
 “ parties all claims for expenses.”

The case accordingly went back to his lordship, who remitted to Mr. William Keith, accountant, to make up

JEFFREY  
 v.  
 PAUL.  
 15th May 1835.

a state of accompts between the parties, relative to the affairs of William Harley, with reference to the respective pleas of parties, and to report. He accordingly did so, and, *inter alia*, reported, that the outstanding trust debts, which yet fall to be paid by Messrs. Cook and Paul, the solvent trustees, exceed the trust funds or subjects sought to be adjudged : that, assuming that the securities sought to be adjudged are liable for the trust debts, it was unnecessary to do more as to Mr. Paul's accounts than to ascertain generally, and it was a fact which he reported as being conclusively ascertained, that Mr. Paul had no trust funds in his hands or under his control wherewith to defray the trust debts : that the advances of Mr. Cook from his own funds, on account of the trust, exceeded those of Mr. Cuthill to the amount of upwards of 10,000*l.* of principal ; for the former had advanced nearly 18,000*l.*, and the latter between 7,000*l.* and 8,000*l.* only : that it appeared to be unnecessary to determine the exact excess of advances, because it was certain that the outstanding trust funds were inadequate to discharge the existing trust obligations, and therefore, whatever might have been the respective advances of Mr. Cook and Mr. Cuthill, as nothing could come back either to Mr. Cook or to Mr. Cuthill's trustee in repayment thereof, any further inquiry into the amount would be useless.

On advising the report with objections by Jeffrey, and a minute stating that Cook was dead, and praying to sist Paul in his place, the Lord Ordinary pronounced this interlocutor :—

“ (4th March 1834.)—The Lord Ordinary sists the  
 “ said Henry Paul in the right and place of the de-  
 “ ceased James Cook in this action, and allows the same

“ to proceed in Henry Paul’s name alone ; finds that  
 “ the sums contained in the securities libelled are appli-  
 “ cable, preferably, not only for payment of any  
 “ balance due to the pursuer Henry Paul in his own  
 “ right, on account of the trust estate libelled, but also  
 “ for payment of the advances made by the late James  
 “ Cook on account of the trust estate beyond the ad-  
 “ vances made by Archibald Cuthill on account of the  
 “ same, as also towards the outstanding debts of the  
 “ trust, and in that view repels the objections to the  
 “ accountant’s report, and decerns in favour of the pre-  
 “ sent pursuer, Henry Paul, in terms of the libel, but  
 “ this without prejudice to any accounting that may  
 “ hereafter take place between him and those interested  
 “ in the trust under his charge : Finds the defender  
 “ liable to the pursuer in expenses.”

JEFFREY

v.

PAUL.

15th May 1835.

Jeffrey presented a reclaiming note against this judgment to the Second Division, on which their lordships pronounced the following interlocutor:—

“ (11th June 1834.)—The Lords having advised the  
 “ cause, and heard counsel for the parties, find that the  
 “ sums contained in the securities are applicable, in the  
 “ first place, for payment of the outstanding debts of the  
 “ trust ; in the second place, in relief and repayment of  
 “ any superadvances made by James Cook ; and in the  
 “ third place, for any balance due to the pursuer  
 “ Henry Paul, in his own right ; and with this variation  
 “ adhere to the interlocutor of the Lord Ordinary sub-  
 “ mitted to review. Further, find additional expenses  
 “ due since the date of that interlocutor. Allow an  
 “ account thereof to be given in,” &c.

Jeffrey appealed.

JEFFREY

v.

PAUL.

15th May 1835.

*Appellant.*—1. In so far as the heritable securities appeared on the face of the records to be in whole or in part the individual property of Cuthill, the appellant, as trustee in his sequestration, was entitled, by virtue of the adjudication in his favour, to claim them on behalf of Mr. Cuthill's creditors; and it was not competent for the Court to give effect to any statements in regard to these securities contradictory of what appeared from the face of the records, or to any latent trust alleged to qualify Mr. Cuthill's *ex facie* right as shown by these records.

This is now conclusively settled, both with regard to purchasers transacting upon the faith of these records, and also with regard to creditors taking steps of real diligence. At one time, indeed, some doubts existed, now entirely set at rest, how far a distinction might not be drawn betwixt purchasers of real property and creditors adjudgers. In regard to purchasers, the principle had always been settled from the earliest periods of the law.<sup>1</sup> But in regard to adjudgers, the doctrine was at one time mooted, that they stood differently situated from purchasers, and took the real right, *tantum et tale*, as it stood in the debtor's person under all the qualifications to which he was himself subjected. And a well-known decision was pronounced, giving some countenance to this doctrine.<sup>2</sup> But subsequent cases very shortly occurred in which, as stated by Mr. Bell, "the decision" in Thomson's case was disapproved of, and departed

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<sup>1</sup> *Workman v. Crawford*, 20th Nov. 1672, (Mor. 10,208); *Ruthven v. Lord Redford*, March 1686, (Brown's Supplement, vol. ii. p. 94); *Anderson v. Dempster*, 14th November 1702, (Mor. 10,213); *M'Cubbins v. Ferguson*, 20th July, 1715, (Mor. 10,250.)

<sup>2</sup> *Thomson v. Douglas, Heron and Company*, 15th Nov. 1786, (Mor. 10,229 and 10,299.)

“from ;” and a series of decisions followed, placing adjudgers on precisely the same footing with purchasers, with regard to the faith to be given to the records.<sup>1</sup>

JEFFREY  
v.  
PAUL.

15th May 1835.

This doctrine has been held applicable to a trustee, under a sequestration.<sup>2</sup> In the present case there were at least two of the securities perfected by infestment, in which, *ex facie* of the records, Mr. Cuthill had an unqualified *pro indiviso* right of property. Such securities are, *ex facie*, redeemable dispositions of the property, and, except as to the mere right of redemption, stand on precisely the same footing with an absolute conveyance ; so that, *ex facie* of the records, there was an heritable disposition in favour of Mr. Cuthill and the other disponees, altogether unqualified, except by the mere right of redemption. There was not only the usual disposition to “heirs and assignees,” (which implies absolute property,) but, in the event of the decease of any of the disponees, the survivors are expressly declared to hold “in trust for the heirs of the prior deceiver.” And nothing can be more exclusive of the idea of a trust for Harley, or any third party, than this declaration ; for in such an event the trust would have vested absolutely in the survivors or survivor for behoof of the original truster.

In this state of things the respondent claims the securities, on the averment that they did not truly belong to Cuthill individually, as the records represented, but were held by him under the condition of a trust, which

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<sup>1</sup> *Russel v. Creditors of Ross*, 31st Jan. 1792, (Mor. 10,300, Bell's Cases, p. 166) ; Bell's Commentaries, vol. i. p. 282. 285. 288 ; *Buchan v. Farquharson*, 24th May 1797. (Mor. 2,905.) See also *Mitchell v. Ferguson*, 13th Feb. 1781, (Mor. 19,296, Hailes, p. 880) ; *Wylie v. Duncan*, 8th Dec. 1803. (Mor. 10,269.)

<sup>2</sup> *Mansfields v. Walker's Trustees*, 28th June 1833, S. & D. vol. xi. p. 813.

**JEFFREY****v.****PAUL.**

15th May 1835.

bound him to apply their proceeds for the benefit of Mr. Harley and of his own co-trustees, and in extinction of the debts and obligations arising under that trust. Now, the short answer is, that this averment is altogether irrelevant as against the appellant. His right to the securities as they appeared from the records could not competently be affected by the allegations, whether true or false. In regard to these two securities, the Court ought not to have allowed the averment to have been even made the subject of inquiry. They ought to have held, that, in a question with the appellant, they could not look beyond the records in order to determine that the right in these securities must be allocated as the records pointed out,—that therefore the appellant, as the singular successor of Mr. Cuthill, was at once to be found entitled to the pro indiviso share of the securities which these records exhibited as his, and that any claim inconsistent with this right could not be sustained.

2. But, independently of the faith to be given to the records, these two securities, in as far as they ex facie appear to be the individual property of the parties in whose names they are taken, must be regarded on that footing, and inasmuch as, even though arising out of transactions connected with Harley's estate, they were taken in these terms for the express purpose of constituting them the individual property of the parties, in reimbursement of the advances which each of these parties had, prior to the date of these securities, made in connexion with Harley's affairs. It by no means follows, that merely because the securities arose out of the transactions of Harley's trust, that these securities cannot possibly be the individual property of the parties in whose

names they are taken. On the contrary, it is quite possible that the parties should have had these securities expressly granted to them, as individual property, for the very purpose of reimbursing advances made by them out of their individual estate. Now the appellant says, that the securities in question stand in this precise situation.

JEFFREY  
v.  
PAUL.  
15th May 1835.

Truly and substantially, the arrangement was just of this character,—that the individuals who were disposed to assist Harley, made each, separately, from his own individual funds, such advances as he found convenient, whilst the disposition of his property by Harley was simply held as a security to the parties, as it bears, “ of  
“ all advances and obligations already come under, or  
“ to be come under, by them, or any or either of them.” There was no prosecution of any definite joint speculation, or even of any definite course of joint management, as is the usual case in a proper trust. The only connexion amongst the parties was, that each of them, being inclined to aid Mr. Harley, made from his own separate funds such advances as he thought proper, the general disposition of Harley’s property remaining as security to all concerned. This is proved by the statements of the respondent himself, whose whole case is rested on the allegation of separate advances being made by Messrs. Cook and Cuthill respectively, of which it is said those by the former were by far the more extensive.

Suppose that the transaction had taken a slightly different shape; that there had been one bond for 1,500*l.* granted in favour of James Cook, “ his heirs and  
“ assignees;” and another, and a separate bond, also for 1,500*l.* in favour of Archibald Cuthill, “ his heirs and  
“ assignees.” It is indisputable, that such a separate

JEFFREY  
v.  
PAUL.

---

15th May 1835.

bond in favour of Mr. Cook could be held as nothing else than the individual property of that gentleman, conveyed to him in reimbursement of his separate advances previously made. Or, at all events, it would be held such, until the most distinct written evidence was produced to prove that it was not his individual property, but unappropriated trust funds. In the same way a separate bond for 1,500*l.* in favour of Mr. Cuthill, his heirs and assignees, would have necessarily fallen to be regarded as his individual property, granted for the like purpose of reimbursement of his separate advances previously made, and liable to be attached by his creditors, and taken up under a sequestration, just like any other individual property. But, if this had been the case, it need scarcely be said, that it makes not the slightest difference, that, in place of two separate bonds for 1,500*l.*, there is one bond for 3,000*l.* granted pro indiviso in favour of "the said James Cook and Archibald Cuthill, and their heirs and assignees." The bond is just as much excluded from being trust property, and as much liable to be dealt with as individual property, as if two separate bonds had been granted.

3. Assuming that the securities are to be regarded as subsisting trust estate, still remaining unappropriated, the only correct or just principle in regard to their application is, that they should be shared among the different trustees, pro rata of the advances made or obligation undertaken by them respectively on account of the trust estate. The question arising in the present case is not raised by third parties, creditors of the trust, or in which such third parties are interested, but is a question amongst the trustees themselves, and exclusively a question inter se; and, as between the trustees them-



selves, there is no other sound principle of apportionment, than that the securities forming the funds of the estate should be allocated amongst them, pro rata of their several advances or obligations on account of the trust. In this respect, the original interlocutor of Lord Mackenzie, of 8th March 1831, was well founded, and ought to be returned to.

JEFFREY  
v.  
PAUL.

15th May 1835.

The plea which was successfully maintained in the Court below was, that the securities were not to be shared by the trustees pro rata of their respective advances, but that these advances must be equalized; that is to say, if one of the trustees has advanced more than another, the securities were to be applied in the first instance in discharging the surplus advances of the former; and until these were paid off, and the parties reduced to an equality, the other trustee was to have no share whatever in the securities; and the case was assimilated to one of partnership or joint adventure.

But this was a most manifest error, for there is no identity between the situation of partners or joint adventurers and trustees. Partners or joint adventurers are united for the purpose of procuring, by their mutual capital and exertions, a common profit, which is divided amongst them, either in certain agreed on proportions, or, where nothing is said, equally. If, in place of a profit, a loss is made, of course this is shared according to the same rule. But in the present case the parties were not united for the purpose of making a common profit, with its attendant contingency of a common loss. There was no adventure of profit engaged in at all; and no union for that purpose. Each trustee separately made advances, to such extent as he was prevailed on to do; one to a greater, another

JEFFREY  
v.  
PAUL.

15th May 1835.

to a smaller amount. Each is entitled just to rank on the trust estate,—which is the common debtor,—for the amount of his separate advance. And there is no sound principle on which any one of them can ask another, personally, to relieve him of a portion of his advances. There was no obligation, express or implied, binding them originally to make equal advances to the trust; and therefore there is no ground on which it can be demanded that the unequal advances should be afterwards equalized. Each advanced so much as he thought prudent, and became a creditor of the trust estate to that amount. But it is inconsistent with legal principle, and would be most unjust, that the man who was so imprudent as to make the larger advances should be entitled to call on his more prudent associate to pay him one half of the surplus, in order to put them on a footing of equality.

Neither can it make any difference in regard to the apportionment of the securities by the trustees inter se, whether the advances of the different trustees consisted of past cash payments or of outstanding obligations. There being no question with the creditors of the trust, but the whole question being one between the trustees inter se, past advances and outstanding obligations by the several trustees stand exactly on the same footing, the whole question being, to what extent, either in the one way or the other, each trustee has respectively advanced, and to what extent, therefore, he is entitled to share in the securities, as divisible inter se.

At any rate, there ought to have been an accurate estimate made of the exact amount of advance by each of the trustees respectively, whether consisting of money paid, or debt undertaken; and the securities declared

to be apportioned accordingly amongst the different trustees, or those in their right; and in particular, before these securities were adjudged to the respondent Mr. Paul, a full investigation ought to have been made into the precise state of that gentleman's accounts with the trust estate; for any balance due to it by Mr. Paul constituted just so much trust funds in his hands applicable to the purposes in question, and which he was bound to see so applied before demanding to be put in possession of these securities.

JEFFREY  
v.  
PAUL.

15th May 1835.

*Respondent.*—1. The facts altogether include the idea that the securities belonged to the parties individually, and not as part of the trust estate. It is proved that Harley in 1816, with the view to a composition contract with his creditors, conveyed his whole property to certain gentlemen “as trustees and fiduciaries, or trustee and “fiduciary, for behoof of the whole of my just and lawful “creditors; and was to be accepted by the said trustees in trust for the ends, uses, and purposes therein “mentioned,” and particularly, that the trustees, in the event of Harley failing to pay either of the instalments of the composition referred to, should have power to sell and convert into money the subjects conveyed to them.

After this trust had been in operation for three years, and the trustees had involved themselves in serious responsibilities, it was arranged that Harley, with their consent, should convey the trust estate to Mr. Cook, Mr. Cuthill, and other gentlemen, one of whom was an original trustee. Accordingly in 1819 a disposition was executed in their favour, “declaring that these presents “are granted, and the said subjects disposed, in trust:

JEFFREY

v.  
PAUL.

15th May 1835.

“ for the purpose of our said disponees or their fore-  
 “ saids selling, feuing, or otherwise disposing of the  
 “ whole of the said property, or such parts thereof as  
 “ they may think proper, absolutely and irredeemably,  
 “ either by public roup or private bargain, for such  
 “ prices as they may think proper to accept of, and  
 “ that with or without the consent or concurrence of  
 “ the said William Harley, and for the purpose of bor-  
 “ rowing such sums of money as can be obtained on  
 “ the security of the said lands, and granting heritable  
 “ bonds and dispositions in security for repayment of  
 “ the same, and applying the proceeds in payment of  
 “ the expenses and charges incurred or to be incurred  
 “ by them in the premises, in payment of all advances  
 “ and obligations already come under or to be come  
 “ under by them, or any or either of them, in relation  
 “ to the said properties or to the affairs of the said  
 “ William Harley, and to pay over the balance to the  
 “ said William Harley, or his heirs or disponees.”

The estate was thus effectually set apart for the trust purposes, and until those were satisfied, it could not be claimed by any party, whether in right of the individual trustees or on behalf of Harley himself. Nor could any distribution of the estate be demanded among the trustees, except on the footing of fair equalization and mutual relief. Numerous other deeds were executed, all on the same footing; and in the course of the trust operations the transactions with Mr. Garden and Mr. Ewing were entered into, under which the securities in question were granted. Mr. Cuthill acted as the law agent in framing them, and the entries in his books represent them as part of the trust estate. Besides, the sum of 3,000*l.* was originally constituted a real burden

on the disposition granted to Garden by the trustees; and the bond, subsequently prepared by Cuthill, cannot affect its true character; and it is admitted that the second bond granted by Garden forms part of the trust estate. But it is pleaded, that whether there was a trust or not, that character did not appear on the face of the bonds in question, and so could not be enforced against Cuthill's creditors.

JEFFREY

v.

PAUL.

15th May 1835.

Now supposing that the whole bonds were expressed in a manner apparently indicating a pro indiviso right in common, in favour of all the parties, there are no grounds for maintaining that the mere terms of a bond are, in such circumstances, to be looked to without reference to the origin, history, and actual destination of the funds. It is impossible, in this case, to say that the form in which these bonds were taken was intended by the parties to exempt them from the operation of the trust. The books and accounts of Cuthill himself, in whose right the appellant now stands, are conclusive of the fact, that the bonds, whatever their terms might be, were all looked upon as belonging to the trust estate, and under the control of the trustees, and as such the expense of them was charged against them by Cuthill. Indeed, it would have been incompetent or highly improper for the trustees to attempt to divide the funds of the trust among themselves individually, while there were still trust purposes to accomplish, and trust creditors to pay. Those creditors, and any others interested in the trust, would have been entitled to complain if their undoubted preference over the trust funds had been prejudiced, or if any thing had been done to destroy the identity of such funds. Nothing of this kind is to be presumed; nothing of this kind was, in

JEFFREY  
v.  
PAUL.  
15th May 1835.

fact, contemplated. The bonds were taken in forms somewhat differing from each other, probably from carelessness on Cuthill's part, but, at least, under a clear conviction that they were sufficiently distinguished as a part of the trust estate, and set apart for trust purposes.

The fact being thus proved, the respondent maintains that there are no grounds for pleading that the bonâ fide character and destination of those bonds can be evaded and frustrated by a claim founded on the mere absence of a declaration of the trust in the terms of all the bonds, or any of them.<sup>1</sup>

The present case does not relate to land rights, appearing to be vested in the parties in property. The rights that here exist are mere securities for the purpose of making more effectual the payment of a money debt, and it is quite fallacious to maintain that the same principle can be applicable to qualified rights of that description as to rights of property, or that creditors or others are entitled to trust, as here pretended, to the faith of what appears on the records. A party who holds a debt secured over heritable subjects has no independent or self-existent right in those subjects which his creditors can attach as a clear and separate estate, without reference to the facts of the case and the situation of the accounts out of which the debt arises. It is the debt that is the proper and substantive right, and the interest in the land is but an accessory. Accordingly, it is certain, and is so laid down in all the authorities, that the records are no security in such a case. An infetment may appear on the record as securing

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<sup>1</sup> Crooks against Tawes, 29th Jan. 1799. (Mor. 14,596.)

an heritable debt, apparently subsisting and undischarged, but no party is authorized to acquire that debt in any reliance upon this apparent fact. In every case of a debt, whether secured or not, it is open to inquire upon what precise footing it stands, with reference to the accounts between the parties. A debt that still remains upon the record may have been discharged by payment, or by consent, or it may have been extinguished by compensation, or by the creditor's intromissions with the debtor's funds; and any competent evidence of its extinction will be good and effectual, into whatever hands the debt may have come. Nay, an apparent debt, duly entered on the records, may never have existed at all, or may have existed on a different footing from the ostensible one. The money may never have been received by the debtor, or it may have been paid by a different party from the supposed creditor. It may often be difficult to prove facts of this kind, even where they have occurred; but if they are competently and fully proved, they must receive effect, either as against special assignees or a general body of creditors, and whether that effect shall be to extinguish the debt altogether, or to qualify the terms and conditions on which it exists. The respondent does not admit, that in the present case, and with the appellant, who stands precisely in the bankrupt's right, an inquiry into the fact would be shut out, even in the case of a right to lands apparently absolute. But that is not the question here at issue. The same records which contain the infestment of Cuthill in these subjects, declare in express terms that the infestment is merely in security of a debt. The idea of resting on the records alone, therefore, is altogether precluded, and parties are expressly

JEFFREY

v.

PAUL.

15th May 1835.

**JEFFREY**  
**v.**  
**PAUL.**  
 15th May 1835.

directed to inquire into the situation of that debt in security of which merely the infestment exists. With the extinction of the debt, competently proved, the infestment would fall, notwithstanding its continuance in the records. With a modification of the terms on which the debt was payable, the accessory security would in the same way come to be effectually qualified.<sup>1</sup>

2. If the respondent be correct in the views which he has submitted, the whole defences of the appellant are fully obviated. There is no objection by the appellant, on the record, as to the mode in which these principles are proposed to be carried into effect by the action in question. The conclusions of that action were framed with the view merely of vesting the trustees then acting with the administration of the funds for trust purposes, and for the discharge of obligations of which they were entitled to be relieved. The action proceeded on the basis that Cuthill refused to concur in uplifting the debts and applying them to the trust purposes. The appellant, as in Cuthill's right, refused in like manner to concur in that object, and the Court have accordingly vested the funds in the person of the respondent, the only party now able or willing to discharge the trust. Their judgment, however, is qualified by a declaration of the purposes for which the funds are so intrusted to him. They have found, " that the sums  
 " contained in the securities are applicable, in the first  
 " place, for payment of the outstanding debts of the  
 " trust; in the second place, in relief and repayment  
 " of any superadvances made by James Cook; and in

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<sup>1</sup> 2 Ersk. 8. 34; Blackwood v. Sutherland, 17th Nov. 1740. (Mor. 14,140.)



“ the third place, for any balance due to the pursuer,  
 “ Henry Paul, in his own right.” And further, while  
 the judgment pronounced decerns in favour of the  
 respondent, it does so expressly “ without prejudice to  
 “ any accounting that may hereafter take place between  
 “ him and those interested in the trust under his  
 “ charge.” This reservation is to be found in the Lord  
 Ordinary’s interlocutor, which was adhered to in that  
 respect by the Court. The effect, therefore, of the  
 judgments under appeal, is merely to recognise the  
 respondent as the only acting surviving and solvent  
 trustee, and to vest him in that character with the right  
 of uplifting the funds in question, and applying them to  
 the purposes of the trust, according to law, subject, at  
 the same time, to an accounting at the instance of all  
 parties having interest for his due application of the  
 funds.

JEFFREY

v.

PAUL.

15th May 1835.

LORD BROUGHAM,—My Lords, in this case it appeared to your lordships, in the course of the argument, that there were three claims, in respect of which, or in respect of Mr. Jeffrey’s right to which, as standing in Mr. Cuthill’s shoes, the question arose;—one was the sum of 1,927*l.*, one of 3,400*l.*, and one of a smaller sum of 400*l.* I had some doubt of the sum of 3,400*l.*, and much greater doubt respecting the 400*l.* My doubts respecting the 3,400*l.* were much removed in the course of the argument on the part of the respondent, and, on further consideration, have been entirely done away, and I am entirely prepared to recommend to your lordships to affirm the decree as to the rateable share of 3,400*l.*, and the rateable share of the 1,900*l.*, but I still think, and I have seen nothing to remove the impression upon

JEFFREY  
v.  
PAUL.

15th May 1835.

my mind at the close of the argument, that the decision must be altered as to the rateable share of the sum of 400*l*. I said I would look into it, for the reason I then gave, and if I did not find my difficulty removed, I should recommend to your lordships to affirm the decree with that exception, and to declare that the pursuer was entitled to one third of the sum of 400*l*., and one third of the sum of 133*l*., with interest, making forty odd pounds; and making altogether a sum of about 176*l*. I have put down the exact figures, and will state them in the order; and with that exception, I move your lordships that this decision be affirmed. The consequence of that judgment of your lordships will be, that there can be no costs of the appeal,—that the decree below must be altered, in so far as there were costs given, and that there must be no costs given against the appellant.

The House of Lords ordered and adjudged, That the interlocutor of the 29th of November 1831 (whereby the interlocutor of the Lord Ordinary of the 8th of March 1831 was recalled), and the interlocutors of the 4th of March and 11th of June 1834, be, and the same are hereby affirmed, with this variation and declaration, That the said appellant is entitled to and ought to receive one third part or share of the principal sum of four hundred pounds contained in the heritable bond by William Ewing in the said proceedings mentioned, with a proportional part or share of such interest as may have been received or may be due and payable therefrom, and also to deduction or repayment of the sum of seventy-four pounds out of the costs found due to the said respondent in the said Court of Session.

A. MACRAE—THOS. DEANS—Solicitors.

[5th June 1835.]

JACOB YEATS, Appellant.—*Lushington—J. Parker.*ALEXANDER THOMSON and others, Respondents.—*Lord Advocate (Murray)—Kenyon Parker.*

*Foreign—Deed, Construction of—Clause.* A domiciled Englishman, who was debtor in an heritable bond over a Scotch estate, the contents of which bond he had consigned in the Bank of Scotland, having executed an English will, by which he declared that the consigned sum should belong to certain trustees; having thereafter executed a Scotch trust deed and settlement, in which he stated that he had, in a separate will as to his property in England, directed that the consigned sum should be transferred to his trustees; and having thereafter executed another English will, which had the effect generally of revoking the first will, and which bequeathed all his personal estate to an executor:—Held (affirming the judgment of the Court of Session,) 1. That the Scotch Court had a right, and were bound to look at the first will in the same way as it would have been looked at in England, in order to discover the testator's intentions as to the consigned sum. 2. That the deeds contained a sufficient declaration of the intention of the testator to appropriate the consigned sum to his trustees; and, therefore, that the trustees fell to be preferred to that sum, and not the executor.

THE late James Yeats was a native of Glasgow, but left Scotland when young, and became a merchant in London. In the year 1815 he purchased from Mr. M'Donald of Lynedale the island of Shuna in Scot-

2D DIVISION.  
Ld. Mackenzie.  
—  
5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

land, at the price of 10,500*l.*; but as the lands were burdened with debt Mr. Yeats paid only 5,000*l.*, the remainder, amounting to 5,500*l.*, being declared in the disposition to be a real burden on the lands.

He at the same time executed and delivered a personal bond which bore this narrative:—

Considering that Alexander M'Donald, Esquire, of Lyndale, by his disposition bearing date the 24th day of March 1815, has sold, &c. to me all and whole the lands and island of Shuna, &c., at the price of 10,500*l.*, and that I have made payment to the said Alexander M'Donald of the sum of 5,000*l.* to account of said price, and that the balance of the said price is, by the said disposition, declared to be a real burden affecting the said property aye and until full payment thereof in manner therein specified, and it was covenanted and agreed upon that I should grant bond for the balance of said price;—he therefore bound himself to pay to the said Alexander M'Donald of Lyndale, his heirs, executors, or assignees, the sum of 5,500*l.*, being the balance of the price of the said lands and island of Shuna, and that at the term of Candlemas 1819, with a fifth part more of penalty in case of failure, and interest of the said principal sum, from and after the term of Candlemas 1815, to be paid half-yearly at the terms of Lammas and Candlemas, &c. And it is expressly declared, that notwithstanding the payment of the said principal sum is postponed to the term of Candlemas 1819, that it shall be in the power of me, the said James Yeats, and my foresaids, to make payment to the said Alexander M'Donald and his foresaids of the said principal sum in such proportions and at such periods,

previous to the foresaid term of payment, as may be convenient for us, I and my foresaids being always obliged to give three months' previous notice when the said payment is to be made, and the amount thereof; declaring always, that these presents shall not hurt or prejudice the real security created over the foresaid lands, for the price thereof, with interest and penalty as above specified; but that the said sum of 5,500*l.*, with interest and penalty, shall continue a real lien and burden over the said lands and island of Shuna aye and until full payment thereof be made in terms of this bond and the disposition before mentioned: As also declaring, as it is hereby specially provided and declared, that, in the event that the said sum of 5,500*l.* is not completely paid at the term before specified, it shall be in the power of said Alexander M'Donald and his foresaids to sell and dispose of by public roup, after due previous advertisement, the said lands and island of Shuna, and others, for payment and satisfaction of the foresaid sums of money, penalty corresponding thereto, and interest that may be due thereon; the said Alexander M'Donald and his foresaids, in the event of such sale, being obliged to account to me, the said James Yeats, and my foresaids, for any reversion there may be after payment of the sums of money before mentioned: Declaring always, that all incumbrances affecting said lands and island of Shuna shall be extinguished and purged before payment of the balance of the said price, as above mentioned.

The reason for withholding payment of the balance, and granting bond for it, arose, not from any inability by Mr. Yeats to pay the amount at the time, but in

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

consequence of the existence of objections to the titles, and burdens which could not be at once cleared off.

This bond was, in 1817, assigned, with the real burden, to the Leith Banking Company. On the term of payment approaching, a correspondence took place between the Leith Bank and the law agent of Mr. Yeats, in Edinburgh, as to depositing the money in their bank, as the titles were not in a state to admit of payment; but Mr. Yeats preferred placing it in the Bank of Scotland, in name of his friend Mr. Samuel Rose. This was accordingly done at Candlemas 1819, (2d February,) and on the following day Mr. Yeats's agent wrote to the agent of the bank in these terms :

“ Agreeably to what I stated to you, I wrote to  
“ Mr. Rose, and communicated to him your wish, that the  
“ money should be paid into your bank. I have not  
“ yet seen or heard from Mr. Rose in answer ; but, in  
“ pursuance of the arrangement with that gentleman,  
“ the amount of Mr. Yeats's bond, with interest, was  
“ paid into the Bank of Scotland yesterday, before three  
“ o'clock.

“ While I am very desirous to close this matter  
“ without a day's delay, and with every wish to prevent  
“ any unnecessary trouble to you and Colonel M'Don-  
“ ald, I am so situated, that I do not feel at liberty to  
“ act differently from that line of procedure which the  
“ state of matters appears to render necessary. The  
“ estate of Shuna appears to have been overloaded  
“ with debt, and it is quite evident, both from the  
“ nature of the thing, and from the express terms of  
“ the bargain, that there must be legal evidence of the  
“ extinction of the debt produced previous to payment

“ of the bond. If the evidence alluded to be ready to be  
 “ produced, I am ready, at half an hour’s notice, to pay  
 “ the money; and I do hope this will be immediately  
 “ done.

YEATS  
 v.  
 THOMSON  
 and others.  
 ———  
 5th June 1835..

“ All, I presume, which can be asked of Mr. Yeats,  
 “ is payment of the contents of his bond, and interest  
 “ up to yesterday, and which I was ready to pay.  
 “ Matters not being ready to close the transaction,  
 “ Mr. Yeats had no alternative but to consign the  
 “ money, and which has been accordingly done. Any  
 “ loss arising from interest, subsequent to yesterday,  
 “ surely cannot attach to Mr. Yeats, and therefore your  
 “ recourse will be against Colonel M’Donald. The  
 “ bond is quite explicit, in the point that all incum-  
 “ brances must be cleared before payment, and in so far  
 “ as this is not done, Mr. Yeats is entitled to retain  
 “ from the price. He has, however, not the most distant  
 “ wish to do so; but if he is obliged, for safety’s sake, to  
 “ do it, he cannot consent to keep the money and to pay  
 “ five per cent., consequently it must be consigned.  
 “ I am perfectly willing, however, to pay any sum to  
 “ account, on a proper discharge, and on a sum suffi-  
 “ cient to pay all apparent incumbrances and expenses  
 “ being allowed to remain deposited in the bank.”

Therefore, on 12th March, 4,000*l.* were paid to the  
 Leith Bank, and the balance, being 1,649*l.* 2*s.* 5*d.*, was  
 left in the Bank of Scotland. Mr. Rose being desirous  
 to withdraw his name, the following memorandum was  
 made between him and Mr. Yeats, on the 11th August  
 1826:—

“ On the 2d February 1819 the sum of 5,649*l.* 2*s.* 5*d.*  
 “ sterling (supplied by James Yeats of Salcombe,  
 “ county of Devon,) was deposited in the Bank of

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

“ Scotland in the name of Samuel Rose, Esquire, com-  
“ missioner of excise in Edinburgh, but, as settled be-  
“ tween the parties, in trust for and to be under the  
“ direction of Mr. Yeats.

“ This sum was part of the price of Shuna in Argyll-  
“ shire, which had then been lately purchased by  
“ Mr. Yeats from a Colonel M'Donald, and was retained  
“ by him till some defects in the title deeds of the  
“ property were removed, and certain stipulated agree-  
“ ments were fulfilled. It was lodged in the above  
“ bank, partly for security, and placed in Mr. Rose's  
“ name, partly in consequence of the distance of  
“ Mr. Yeats's residence in England,—but chiefly to show  
“ to M'Donald, or others concerned, that he (Mr. Yeats)  
“ derived no benefit whatever from the deposit, or by  
“ withholding the money

“ On the 12th March 1819 Mr. Yeats authorized  
“ Mr. Rose to advance 4,000*l.* sterling, in further pay-  
“ ment of the purchase money, to the Leith Banking  
“ Company, which had then, by assignment from  
“ M'Donald, become entitled to receive it. The balance  
“ left in the bank was therefore 1,649*l.* 2*s.* 5*d.*, with the  
“ interest of the whole original deposit.

“ Unwilling to continue longer in such a protracted  
“ trust, Mr. Rose has this day, with the consent of  
“ Mr. Yeats, given up the receipt or document granted  
“ by the bank when the deposit was made; and the latter  
“ has taken in his own name two receipts, one for the  
“ above balance of 1,649*l.* 2*s.* 5*d.*, and another for  
“ 387*l.* 12*s.* 6*d.*, the interest now due.

“ Mr. Rose stands, therefore, clear of all concern in  
“ the transaction, and both parties have subscribed this  
“ memorandum explanatory of it.”



In 1827 Mr. Yeats had a correspondence with his friend, Mr. Alexander Thomson, banker in Greenock, (afterwards named one of his trustees,) and on the 13th January wrote to him :—

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

“ I have received the newspaper with the advertise-  
“ ment of the sale of Lynedale. I wonder it has been  
“ retained so long. The deposit on account of Shuna  
“ (1,500*l*.) is still in statu quo, and will for some  
“ time, I suspect, remain so. He can have no interest  
“ whatever in it; if he had, the very walls of the Royal  
“ Bank<sup>1</sup> would run some risk of being stormed.”

Again on 28th May 1827 he wrote to Mr. Thomson :—“ I had heard of Colonel M'Donald's death  
“ before. There is 1,500*l*., with several years' interest,  
“ lying, in my name, in the Bank of Scotland, till  
“ certain defects in the title deeds of Shuna are  
“ removed. The Leith Bank have an assignment of  
“ the sum, and it is odd that, though only 3 per cent.  
“ is allowed on the deposit, they seem to be careless  
“ about the business. He, the Colonel, could not, I  
“ suppose, have any interest in it; but why did not  
“ they push him to purge the titles?”

In another letter to the same gentleman, dated 23d January 1828, Mr. Yeats says :—“ My law agent in  
“ Edinburgh (for unhappily I am obliged to have one  
“ there, too, solely on account of Shuna and the late  
“ owner, M'Donald,) writes to me that there is likely  
“ to be litigation between the trustees of that gentleman  
“ and the Leith Bank, with respect to the part of the  
“ purchase money (1,500*l*., with interest,) which is  
“ deposited with the Bank of Scotland. I think you

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<sup>1</sup> Mr. Yeats was under the erroneous idea that the money was in the Royal Bank, or rather, that the Royal Bank and the Bank of Scotland, which he called the Royal Bank of Scotland, were one and the same.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

“ once said you, or a friend of yours, had some money  
“ connexions with this ripp. Does it at all concern  
“ you? The principal and interest now lying in deposit  
“ must exceed 2,000*l*. I think the Leith Bank has the  
“ right; but, if you wish it, I will give you all the  
“ intelligence I can.”

In this state of matters Mr. Yeats, on 15th April, executed a will, at Salcombe in England: it was in these terms:—“ The last will of me, James Yeats  
“ of Salcombe, in the parish of Malborough, Devon-  
“ shire, as it respects the island of Shuna, near  
“ the island of Luing in Argyllshire, which first-men-  
“ tioned island is my sole property: I hereby appoint  
“ as executors or trustees of this my will Alexander  
“ Thomson, Esq., banker in Greenock Thomas  
“ Waller, Esq. of Crosslane, St. Mary’s in the East  
“ London, wine merchant, and Mr. Henry Strong of  
“ Salcombe aforesaid, and their heirs and assigns, to  
• “ whom I give and devise my said island of Shuna, with  
“ all its appendages, in trust to assign and convey the  
“ same, as soon after my decease as conveniently can be,  
“ and in the proper legal mode required by the Scotch  
“ law, to the Lord Provost and principal Magistrates  
“ of the city of Glasgow (my native place) for the time  
“ being, and to their successors for ever, in trust, to them  
“ and their said successors, for the uses and purposes  
“ herein-after mentioned; and in the interval between  
“ my death and such conveyance I authorize my said  
“ executors or trustees first mentioned to receive the  
“ rents and profits of the said estate, and to manage  
“ it in the manner they may think best, but to be  
“ accountable to the trustees last named for the net  
“ produce of what they do receive, after deducting, of  
“ course, the charges necessarily incurred.” He then

stated the purposes he had in view; after which he  
 proceeded thus: "As the island of Shuna appeared,  
 "from the public registers, to be greatly incumbered  
 "when I bought it in 1815, and the title deeds were  
 "in consequence very defective, a moiety of the pur-  
 "chase money was retained till these defects were  
 "purged, and there still remains a balance of 1,500*l.*,  
 "with interest, amounting together to about 2,000*l.*,  
 "deposited in my name in the Royal Bank of Scotland,  
 "for which I possess the bank's notes or receipts. My  
 "will is, that after my decease, these notes or receipts  
 "shall become the property of, and be indorsed or  
 "transferred by my executors in another will respect-  
 "ing my property in England, to my trustees, the  
 "magistracy of Glasgow; but that the money should  
 "remain where it now is till the defects in the title  
 "deeds, as above mentioned, are cured, or till the said  
 "trustees are fully satisfied with respect to the same,  
 "and till an entry is made with Lord Breadalbane, the  
 "superior of Shuna, to whom a yearly feu-duty of 8*l.*  
 "is payable, of a new vassal after the death of Maclean,  
 "the existing one, according to a stipulation made by  
 "me with Colonel M'Donald, my predecessor in Shuna.  
 "These done, the sum held in deposit will become the  
 "property of his successors or assigns (for he is dead),  
 "and must accordingly be given up or transferred to  
 "them on discharging an heritable bond by me to the  
 "Colonel, for the unpaid price of the original price."

On the 1st of May of the same year he made  
 another will, in which, without revoking that of  
 the 15th of April, he gave and bequeathed, subject to  
 payment of certain annuities, "all my chattels and  
 "effects of whatever nature to Jacob Yeats, (the appel-

YEATS  
 v.  
 THOMSON  
 and others.  
 ———  
 5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

“lant,) son of my brother William Yeats, together with  
“the liferent of all my lands and houses in the above  
“parishes and other places, except the island of Shuna  
“in Argyllshire, which I have otherwise disposed of, on  
“condition that he does pay the above-mentioned  
“annuities, together with all my lawful debts, for which  
“latter purpose I do hereby authorize him to sell, by  
“public sale, my property at Camlachie, near Glasgow,  
“which I reckon worth 5,000*l*., and, after discharging  
“such debts, to appropriate the remainder to himself.”  
He concluded in these terms: “and I appoint executors  
“of this my will, Thomas Waller of London, wine  
“merchant, and Henry Strong of Salcombe, maltster,  
“whom I have likewise named executors and trustees in  
“a separate will which disposes of Shuna, and of a deposit  
“of money which lies in deposit with the Royal Bank of  
“Scotland, and is to remain there till certain defects in  
“the title are cured.”

This will was found cancelled by a pen being drawn through it, and with this note subjoined:—

“Cancelled by another will. (Initd.) J. Y.”

In January 1829 he wrote to Mr. Thomson:—“The  
“death of my predecessor, M'Donald, has not pro-  
“duced, what I expected, a settlement of that part of  
“the price of Shuna (1,500*l*. with accumulating interest  
“at 3 per cent.), which, for a series of years, has lain  
“in deposit with the Bank of Scotland. I fancy, as it  
“has not been settled now, there is some defect which  
“cannot be cured till the decease of an old Highlander,  
“the present vassal, and that the money must remain  
“in deposit till then. Is there no removing it to your  
“bank, and will it be any advantage to you? I have  
“the bank's note; but can it be legally done?”

Mr. Thomson replied, “ The residue of the price of  
 “ Shuna (1,500*l.*) must remain as it is. At this office  
 “ we are quite overstocked with deposit money, and  
 “ would rather pay out 50,000*l.* or 100,000*l.* than re-  
 “ ceive any more.”

YEATS  
 v.  
 THOMSON  
 and others.  
 —  
 5th June 1835.

He appeared to have been made aware by  
 Mr. Thomson, that the will of April 1828 was inept  
 to convey heritable property in Scotland, and, hav-  
 ing got a form of a disposition, he himself wrote a  
 draft deed, with a proper dispositive clause, in which  
 he inserted the purposes set forth in the will of  
 April 1828, and also this declaration:—“ As the island  
 “ of Shuna appeared from the public records to be  
 “ greatly incumbered when I bought it from Colonel  
 “ M'Donald, 5,500*l.* of the price was retained by me,  
 “ and lodged in the Royal Bank of Scotland, till the  
 “ estate was cleared of these defects in the titles. Of  
 “ this sum there still remains, in the same depository,  
 “ of principal and interest, about 2,000*l.* Besides  
 “ clearing the incumbrances, Colonel M'Donald is  
 “ under obligation to me to enter at his expense a new  
 “ vassal with the superior Lord Breadalbane,—a new  
 “ one instead of M'Lean the old one, who is still alive.  
 “ This will cost M'Donald's creditors or successors a  
 “ year's rent of Shuna. But the titles, that is, the  
 “ incumbrances cleared, and the entry with the  
 “ superior made, the notes or receipts I hold of the  
 “ Royal Bank will become, with the interest due  
 “ upon them, the property of Colonel M'Donald's  
 “ creditors, or successors or assigns, and must be  
 “ given up on delivery or discharge of my heritable  
 “ bond for the balance of the price of Shuna. One of  
 “ these bank notes or receipts is for 1,649*l.* 2*s.* 5*d.*,

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

“ and the other for 387*l.* 12*s.* 6*d.*, being the interest  
 “ which had accrued at the time of settling with the  
 “ Bank in 1826. Now, if this transaction should not  
 “ be closed before my death, I have, in a separate will,  
 “ which respects my property in England, di-  
 “ rected my trustees or executors in that will to  
 “ assign or indorse the notes or receipts of the Royal  
 “ Bank to my said trustees, the Lord Mayor and  
 “ Bailies, to be kept by them in the same depository  
 “ where they now are till the above defects are cured,  
 “ and till the entry stipulated to be made with the  
 “ superior is implemented ; or if the latter is called for  
 “ before the titles are purged, it may, with no im-  
 “ priety, be taken from the sum in deposit.” It was  
 not disputed that this deed effectually vested Shuna in  
 the trustees. On the 17th of this same month he  
 made a will, but which did not contain any clause of  
 revocation. He there stated, “ It may be proper to  
 “ observe, that by a will made by me in this present  
 “ month and year I have disposed of the island of  
 “ Shuna in Argyllshire, Scotland ;” and after various  
 bequests there was this provision : “ As to my goods  
 “ and chattels, wherever situated, I give and bequeath  
 “ them to the said Jacob Yeats, his heirs and assigns,  
 “ requesting, but not enforcing, his observance of some  
 “ private instructions which accompany, but are not to  
 “ be considered as any part of this, hereby appointing  
 “ him, and his aforesaid, my sole executor and resi-  
 “ duary legatee. It may be well to mention, that I  
 “ include in this bequest my stock of cattle and other  
 “ effects in Shuna, which are considerable.”

He died in August of the same year, whereupon the  
 appellant obtained probate of the will dated the 17th

April 1829, in the English courts, and was confirmed executor in Scotland. A dispute then arose as to the money deposited in the Bank of Scotland; the appellant claiming it under the will; and the Shuna trustees maintaining that they had right to it, for the purpose of disburdening the lands of Shuna of the real security constituted over it, for the balance of the price. To settle these competing claims a summons of multiple-poining was brought in name of the Bank of Scotland, to which the appellant and the trustees were called as parties. The Leith Bank were not called as parties, but they raised an action against the appellant, as executor of Mr. Yeats, in which they set forth that Mr. Yeats had granted the bond and security for 5,500*l.* which had been assigned to them; that in 1819 Mr. Yeats had paid to them the sum of 4,000*l.* sterling, “ in part payment of the foresaid sum of 5,500*l.* sterling, “ contained in the foresaid bond by him to the said “ Alexander M'Donald, and of which sum of 4,000*l.* “ and foresaid real burden to that extent,” the bank granted a discharge to Mr. Yeats in the year 1827, “ and that the said sum of 1,500*l.* sterling, being the “ balance of principal contained in the said bond after “ deduction of the foresaid payment, with the interest “ of the whole of the said principal sum of 5,500*l.* from “ the term of Lammas 1818 to the said 15th day of “ March 1819, when the said payment of 4,000*l.* was “ received, and also the interest of the balance of “ 1,500*l.* from and since the said 15th day of March “ 1819, with the penalties corresponding thereto re- “ spectively, are still resting and owing to the said “ Leith Banking Company: That the aforesaid sum “ of 5,500*l.*, as the balance of the price of the island of

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

“ Shuna, was deposited by the said deceased James  
“ Yeats in the Bank of Scotland, upon an express un-  
“ derstanding and agreement, that it should be applied  
“ in payment of the price as soon as the incumbrances  
“ over the estate, which then existed, were cleared.  
“ That the above-mentioned sum of 4,000*l.* was paid to  
“ the aforesaid trustees of the Leith Banking Company  
“ out of the money thus deposited with the Bank of  
“ Scotland, and that the remaining sum of 1,500*l.* was  
“ again deposited, on the same understanding and  
“ agreement, in the hands of the Bank of Scotland,  
“ and the receipts therefor taken in the name of the  
“ said James Yeats.” After also stating, “ that the  
“ incumbrances were now cleared,” they concluded  
that the appellant should be ordered to pay the  
amount to them. On the dependence they arrested  
the money, and then entered a claim in the process of  
multiplepoinding.<sup>1</sup>

The Lord Ordinary pronounced the following inter-  
locutor:—“(17th Jan. 1832.) The Lord Ordinary, having  
“ heard parties’ procurators, &c., prefers the claimants,  
“ the trustees of the late James Yeats of Shuna, to the  
“ fund in medio, and the interest that has accrued there-  
“ on; and repels the claims for the other claimants; and  
“ decerns in the preference, and against the raisers of  
“ the multiplepoinding accordingly: Finds no expenses  
“ due to any of the claimants.”

Against this interlocutor the appellant reclaimed to  
the Inner House; and the trustees and the Leith Bank

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<sup>1</sup> The bank stated that if decree were pronounced in favour of the  
trustees it would be satisfactory to them; and therefore it is unnecessary to  
state the pleas of the bank, as the judgment of the Court of Session pre-  
ferring the trustees was affirmed.



also reclaimed upon the point of expenses. Their Lordships thereupon pronounced the following interlocutor :  
 “ (24th May 1832.)—The Lords, having considered this  
 “ note with the three other reclaiming notes, &c., adhere  
 “ to the Lord Ordinary’s interlocutor ; find the trustees of  
 “ the late James Yeats entitled to the fund in medio, and  
 “ the interest that has accrued thereon, and decern ; with  
 “ this explanation, that the said trustees shall apply the  
 “ fund in medio, and interest thereon, in payment of  
 “ the heritable debt over the island of Shuna, held by  
 “ the Leith Banking Company, upon their clearing the  
 “ incumbrances on the property, and performing any  
 “ other stipulations that may be incumbent on them ;  
 “ and remit to the Lord Ordinary to hear parties  
 “ thereon, and also as to the question, whether the  
 “ expenses of the confirmation obtained at the instance  
 “ of the claimant, Jacob Yeats, as executor of the  
 “ deceased James Yeats, and claimed by him, should  
 “ be paid out of the fund in medio ; and to hear parties  
 “ thereon, and do therein as he shall see cause.”<sup>1</sup>

YEATS  
 v.  
 THOMSON  
 and others.  
 —  
 5th June 1835.

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<sup>1</sup> 10 S. D. B. p. 569. In deciding the case *Lord Glenlee* said : “ I am  
 “ for adhering, but with this qualification, that, after discharging any  
 “ incumbrances remaining over Shuna, the fund should be paid over to  
 “ the Leith Bank, who are now in right of Colonel M‘Donald.”

*Lord Cringletie.*—“ The fund having been arrested by the Leith Bank,  
 “ I did not see what we had to do with the question of appropriation, or  
 “ how the trustees can compete with onerous creditors having arrested.  
 “ Lockhart’s trustees’ arrestments are posterior to those of the Leith  
 “ Bank, and I would give decree in favour of the bank, subject to the  
 “ burden of paying incumbrances.”

*Lord Glenlee.*—“ That is the more correct form, but it will not really  
 “ alter the case.”

*Lord Meadowbank.*—“ I think so too ; at the same time, unless the  
 “ Leith Bank desire it, I would allow the interlocutor to stand, prefer-  
 “ ring the trustees, subject to the qualification proposed by Lord  
 “ Glenlee.”

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

Jacob Yeats appealed.

*Appellant.*—1. The first point of inquiry is, what would be the rights of parties under the terms of the deeds, leaving out of view any special direction regarding the deposited money.

It is clear that the will of 17th April 1829, bequeathing to the appellant the “goods and chattels, wherever situated,” and appointing him sole “executor and residuary legatee,” followed by confirmation, is sufficient to vest in the appellant all the testator’s funds, whether in England or Scotland. On the other hand, it is equally clear that by disposing to trustees the island of Shuna, burdened with a heritable lien for payment of a certain sum, the testator gave to these trustees the lands with every incumbrance of a real nature attaching to them, as vested in his own person; and that the parties acquiring the lands so burdened would, under the general rule, have no relief against any other party with reference to that burden. At all events, the appellant, as executor, could never be called on to pay out of the moveable funds a debt which was not moveable, but which had been made heritable by the testator himself.<sup>1</sup>

*Anderson for Leith Bank.*—“ We are satisfied with the proposed qualification, and do not require the decree of preference to be in the name of the bank.”

*Lord Justice Clerk.*—“ Then we adhere, subject to the qualification.”

*Jameson, for the Executor,* craved “ that the Court should introduce into the interlocutor, ‘ In respect of the arrestment by the Leith Bank ‘ adhere,’ &c. ; but the Court declined so to limit the grounds of decision, and adhered, subject to the qualification, that on the incumbrances being purged, and the obligations come under by Colonel M‘Donald fulfilled, the balance should be paid over to the Leith Bank.”

<sup>1</sup> Stair, B. III., tit. 5. sect. 17; sect. 13; tit. 8. sect. 65. Erskine, B. III., tit. 8. sect. 52; tit. 9. sect. 48. Robertson’s Creditors, 13th Dec.

2. The next inquiry is, whether any such special direction subsisted at the testator's death, or formed part of the settlement of his succession, as to supersede the general rule.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

There are two ways in which it may be contended that the money deposited in bank was set aside for the relief of the trustees. It may be said that the testator by destination devoted the money for this purpose; or that the money was so appropriated, not merely by the will of the testator, but by some previous arrangement with third parties, creating a vested interest in this deposited money. But it is obvious that these two grounds are distinct and independent. The question of destination or testamentary disposal is different from an arrangement *inter vivos*, and indeed in one sense the two things are incompatible, since an appropriation *inter vivos* would have superseded any question of will, and the allegation of an expression of testamentary will, seems to imply that there had been no previous agreement for appropriation of a similar kind.

On the point whether in the testamentary deeds by which the succession of Mr. Yeats is to be regulated, there is a destination of the deposited money in favour of the trustees, to the exclusion of the appellant as executor and residuary legatee, it is conceived little difficulty can be entertained.

It is obvious that the will of 15th April 1828 was superseded by subsequent deeds, so that it has not now any influence on the question. It was inept by the law of Scotland to carry heritable property, and a new deed

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1803. Morrison, Competition, Appendix, No. 2. Clayton v. Lowthian, 3d March 1826. 2 Wilson and Shaw's Appeal Cases, p. 40.

YEATS  
v.  
THOMSON  
and others.

5th June 1835.

was framed by the testator on 1st April 1829, by which the provisions of the first were virtually cancelled.

Again, the will of 1st May 1828 was actually cancelled by the testator, and marked as being so by his own initials; and therefore it is only necessary to consider the effect of the trust disposition of 1st April 1829, which it is admitted is in part at least an effectual deed for regulating the succession.

On attending to the terms in which the subject of the deposited money is introduced, it is impossible to say that there is a substantive or direct bequest of it in any particular way. The disposal of that money was not intended to be regulated by that deed, and it is mentioned merely by relation to another will, the terms of which, if it can be found, and if it still subsists, can alone be considered as containing the testator's positive and ultimate declaration of his intention upon the subject. The testator says,—“ I have in a separate will, “ which respects my property in England, directed my “ trustees or executors in that will to assign or indorse “ the notes or receipts of the Royal Bank to my said “ trustees, the Lord Mayor and Bailies.”

He here refers to the will of 1st May 1828. But subsequent to the execution of the trust disposition, the testator, on the 17th of April 1829, executed another will cancelling the will of 1st May 1828, and containing the ultimate declaration of his intentions as to his English property, and as to his personal funds generally. It is impossible, therefore, in this state of the case, that the allusions made in the trust disposition to the will then subsisting can be founded on as declaratory of the

testator's ultimate intentions, as that will itself was subsequently recalled, and another substituted in its place.

But the will of 17th April 1829 is in favour of the appellant's pleas. It gives him the whole goods and chattels of the testator wherever situated. It appoints him sole executor and residuary legatee. It subjects him in payment of certain bequests, but it contains no legacy or provision of any kind as to the deposited money. It does not, as pointed at in the trust disposition of the 1st April preceding, direct the appellant, as executor, to assign or indorse the notes or receipts of the bank to the trustees, nor does it qualify the general bequest in the appellant's favour by any condition or exception on the subject.

3. The next inquiry to be made, is, whether there was any previous arrangement inter vivos as to the appropriation of this money, so as to create a vested interest in third parties, of which the Shuna trustees might be entitled to avail themselves.

In considering how there could be any specific appropriation of this subject it is obvious that it could only arise in consequence of an express agreement with the creditors holding the bond and real lien over Shuna. There could be no agreement with the Shuna trustees, because their interest in the succession was altogether mortis causâ, and there were no other parties, except the Leith Bank, with whom any agreement of appropriation could be made.

Now, the whole evidence and history of the case show unequivocally, that there never was, as between the testator and the Leith Bank, a valid or concluded agreement for appropriating this fund to the payment of the debts over Shuna.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

It may be true that Mr. Yeats at first deposited the money in bank in the hope that it would either bring about a settlement of the transaction, and lead to an immediate clearing of the incumbrances on the Shuna titles, or would stop the currency of legal interest upon the debt. But the Leith Bank, the creditors in the bond, never closed with this proposition, nor recognized the deposit as affecting them or made for their behoof. Indeed, during Mr. Yeats's life, they never alluded or referred to the deposit. In the discharge of the 4,000*l*. which was paid out of the deposit not the least allusion is made to that fact. Then, after Mr. Yeats's death they did not commence any process to have this special fund declared to belong to them, or even to have the executor ordered to assign it to them. They brought an ordinary action against the executor, concluding generally for payment of the debt due by Mr. Yeats's bond, to be recovered out of all or any of the effects of the deceased, and upon this action they used an arrestment, attaching all sums whatever in the hands of the Bank of Scotland belonging to the appellant as executor, in the very same way as any ordinary or general creditor of the executor's would have done. Further, they did not limit their claim merely to such interest as arose and had accumulated in the hands of the Bank of Scotland, but they claimed the full legal interest upon the amount of their debt from the time when it became due to them till paid, with a fifth more as the penalties of failure.

Besides, the money was plainly at the risk of Mr. Yeats. If the bank had failed he alone must have suffered. The Leith Bank had in no way sanctioned

this deposit, so as to limit their original claim against their debtor.

Further, the claim of the Leith Bank was in no ways restricted to the fund deposited, either as respects the principal, or the interest which it was yielding. They were not precluded from claiming their money, either out of the lands of Shuna themselves, or from the general estate of their debtor.

Supposing also that Mr. Yeats had become insolvent in his lifetime, or had died in that state, the Leith Bank had obviously no such vested interest in the money deposited in bank as would have enabled them to compete preferably with his general creditors, or with any individual creditor using diligence by arrestment or otherwise; and under a sequestration or other process of distribution in bankruptcy, this fund would have been divided as a part of his ordinary moveable estate; or, supposing that claims had arisen on the part of the Bank of Scotland against Mr. Yeats, they would have been entitled to retain the money deposited with him after the receipts were taken in his own name in payment or security of their claims, and any pretence of appropriation in favour of the Leith Bank would have been disregarded.

All these circumstances are inconsistent with the idea, that there was a completed arrangement as to the appropriation of this money, in which any person whatever had a right or vested interest.

This case is entirely different from that of Lord Minto against Sir William Elliot, decided in the House of Lords, 29th June 1825, relied on by the respondents.<sup>1</sup>

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

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<sup>1</sup> 1 Wilson and Shaw's Appeal Cases, p. 678.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

An attentive consideration of that case, and of the grounds on which it was affirmed by your Lordships, will show that, so far from being a parallel, it is in all its circumstances a direct contrast to the present case.

In the first place, in so far as regards the question of testamentary intention, the testator's operations regarding the money were, in Lord Minto's case, subsequent to the will and other mortis causâ deeds; while in the present instance the will on which the appellant founds is subsequent to the acts on the testator's part from which a contrary destination is attempted to be inferred. And as to the alleged agreement of appropriation inter vivos, there was, in Lord Minto's case, a contract entered into, and an equitable right conferred on a third party, which cannot be pretended here. Even in such circumstances, Lord Gifford considered the case as attended with the utmost difficulty.

*Respondent.*—1. On the first point, raised by the appellant, that of intent, the whole of the testator's conduct, connected with the disputed fund, most clearly shows that it never at any moment of time was his purpose to bestow it upon the appellant, but that it was his settled determination throughout, that it should be employed in the disincumbrance of his property of Shuna.

Mr. Yeats made his purchase of Shuna in January 1815. The price was to be 10,500*l*; but the property being heavily burdened with debt, and the seller, in consequence, not in a situation to give a sufficient title, it was arranged that only 5,000*l* should be instantly paid, and the remainder not until Candlemas 1819; Mr. M'Donald being bound, in the meanwhile, to clear the property from all incumbrances affecting the same;



and the last moiety of the price remaining a burden on the lands until that could be accomplished.

This postponement was necessary solely from the inability of the seller to give an unfettered title, and it was never doubted that before Candlemas 1819, the eventual term that was fixed for payment, all would be clear. Mr. Yeats was from the first ready to pay the price, and if the price had been paid, the estate would have descended at its utmost value to his heir. He could not mean this state of things to be infringed upon, merely because the seller was not ready to receive the price. On the contrary, he granted a personal bond, binding his executor, and not his heir, to pay; and so little is the monies remaining on the footing of a real burden an object with Mr. Yeats, that it was deemed necessary expressly to declare, in the personal bond, “that these presents shall not hurt or prejudice the real security;” obviously implying that the personal bond was truly the predominant obligation in the sight of both parties.

Matters thus remained until 2d February 1819, when the second moiety of the price had been stipulated to be paid. Mr. Yeats was ready with funds to discharge the debt, and he was, through his agent, in communication with the bank to this effect. He actually tendered payment. A draft of the requisite deed of discharge was even prepared, transmitted for revisal, and returned revised. It was no act of Mr. Yeats’s, that payment was not made; the hindrance arose now, as it had arisen from the first, on the seller’s side; he and those in his right had not yet succeeded in fulfilling their obligation “to clear the property from all incumbrances affecting the same.” Mr. Yeats, accordingly, had no

YEATS  
v.  
THOMSON  
and others.  
——  
5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

alternative left him but to withhold payment ; he did not, however, retain the money in his own hands, but, adopting the equipollent nearest to payment, he consigned it with the Bank of Scotland under an arrangement duly notified to the creditor.

It was so deposited in the name of Mr. Samuel Rose, as in some sort a trustee for all concerned. The sum consigned was not a slump or random sum which left any thing for after discussion and adjustment among the parties ; it was the precise and exact amount of the debt due, with interest down to the very term day stipulated in Mr. Yeats's bond. There is no dispute, that had this sum being actually paid, instead of being merely consigned, it would have completely and for ever extinguished the debt out of which the present litigation has arisen.

The Leith Bank applied for, and instantly obtained, a sum of 4,000*l.* out of the deposited fund, as the amount of incumbrances extinguished ; while the remaining 1,649*l.* 2*s.* 5*d.* was " allowed to remain deposited in the " bank," as a sum sufficient to meet those incumbrances which were yet unextinguished.

It is true, that the deposit which had been originally made in Mr. Rose's name was transferred into Mr. Yeats's own name. But Mr. Yeats, considering himself as divested of all substantial power over the money in its character of a deposited fund, a formal memorandum was drawn up and executed between him and Mr. Rose, explanatory of all that had taken place.

It was more than a year and a half after this when Mr. Yeats executed the first of that series of testamentary deeds on the construction of which the present question has arisen ; and all these deeds imply that it

was the testator's intention to vest the island in his trustees, free from every burden; while the consigned money was not to remain part of the residuary estate, but was destined to the special purpose of disincumbering the property of Shuna; and it was the property of Shuna, thus disincumbered, which he meant to vest in the trustees. Nay, there is an actual devise of the consigned money itself, and the notes or receipts by which it is vouched against the depository, in favour of the respondents as trustees.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

The question then comes to be, whether Mr. Yeats, having once unquestionably conferred upon the respondents a right to the deposited money, and having by the very fact of doing so, as well as in more direct terms, excluded the appellant, his residuary legatee, from all right to that fund, did ever afterwards change his mind as to the disposal of this portion of his property, so as (for that is the result of the appellant's argument) directly to invert the position of the parties in regard to it.

Now, whatever may be said as to the deed of 1st May 1828, it is undoubted, that Mr. Yeats never either cancelled or revoked his first will of 15th April 1828.

It is true that, in so far as that deed had relation to the disposal of the estate of Shuna, as a Scotch heritable estate, Mr. Yeats came to entertain doubts how far the deed of 15th April 1828 might be technically sufficient to carry heritage. In this view accordingly, and for the purpose of strengthening the grant which he had made, he prepared and executed a formal deed, in which he inserts a clause almost exactly similar to

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

that which had been contained in the first deed in regard to the deposited money.

But it has been contended that the deed of 1st May 1828 is the will referred to in that of 1st April 1829 as the "separate will which respects my property in "England," that it was subsequently cancelled, and that, of course, any directions contained in it for the assignment or indorsation of the deposit receipts must have fallen to the ground along with it. This is an entirely mistaken view of the matter. For the will of 1st May 1828 is not the deed which contains the directions in question. These are contained in the deed of 15th April 1828,—the deed of 1st May merely containing the nomination of the executors upon whom the directions were to be binding. Now, the deed of 15th April was never revoked, and, of course, the directions contained in it stand at this moment in full force. Besides, in order to get at the meaning of the deed of 1st April 1829, it is nowise necessary to resort to any argument connected with the cancellation of the will of 1st May 1828, for as that will was not cancelled until after the date of the deed of 1829, it follows, that, even were it necessary to refer to the will of 1st May 1828, in order to get at the directions which the testator refers to in his deed of 1st April 1829, the will of 1st May 1828, which still existed at the date of that deed, might competently be resorted to.

The only other deed which he executed was the will of 17th April 1829; that day being exactly sixteen days posterior to the deed which the respondents have just been commenting upon; and it cannot be pretended that within this short interval Mr. Yeats had changed

his mind upon a matter which had so long been the favourite scheme of his life. The contrary appears from the correspondence.

YEATS  
v.  
THOMSON  
and others.

5th June 1835.

Besides, this deed contains no express words of revocation, applicable to the former deeds, or to any of them; and, therefore, in so far as it is not absolutely irreconcilable with and in open contradiction to these deeds, it must be construed in conformity. And not only does it not contain any words of express revocation, but it contains words of positive recognition. Thus it says, "it may be proper to observe that, by a will made by me in this present month and year, I have disposed of the island of Shuna in Argyllshire, Scotland."

The only clause which affords the appellant the slightest pretence for maintaining his present claim, is that which is contained in the deed of 17th April 1829:—"As to my goods and chattels, wherever situated, I give and bequeath them to the said Jacob Yeats, his heirs and assigns, requesting, but not enforcing, his observance of some private instructions which accompany, but are not to be considered as any part of this, hereby appointing him, and his aforesaid, my sole executor and residuary legatee."

But this clause is nowise stronger than the corresponding clause which devised the testator's "chattels and effects of whatever nature" in the deed of 1st May 1828. Yet that clause was not held by the testator to have been at all inconsistent with a grant of the deposited money in favour of the respondents, as it certainly was nowise intended by the testator to confer any right to that deposited money upon the appellant. On the contrary, it was contained in a deed which dis-

YEATS  
v.  
THOMSON  
and others,  
—  
5th June 1835.

tinctly referred to the Shuna trust, as having already disposed both “ of Shuna and of the deposit ” in question.

2. The next question is, whether Mr. Yeats’s intention has been legally carried into effect.

There is no difficulty of a technical kind, and this is not disputed. Therefore, as in a question with the appellant, who can of course take no more than the testator intended to give him, it is plain, that if the respondents have succeeded in proving the intention of the deceased to have been in their favour, there is at once an end to the dispute. There being here no question of succession ab intestato, and the parties taking hinc inde all that they are entitled to take, solely and exclusively under the testamentary deeds, which are admitted to carry to one or other of them the whole property belonging to the deceased, there cannot possibly be any inquiry except as to the testator’s intention ; for when it is fixed what he intended to give to the one, and what he intended to give to the other, the distribution must of course be made accordingly ; or else this absurdity would arise, that a portion of the estate would be given contrary to the testator’s intent.

Indeed, they apprehend that there is a direct bequest of the fund to them for the purpose of the trust. But, independently of this, there is such a plain appropriation and destination of it for their benefit in the setting of it apart for the discharge and extinction of the unpaid balance of the price of Shuna, as completely to take it out of the residuary portion of the estate conferred upon the appellant, and to entitle the respondents to insist that it shall be applied to the special end for which the testator had thus destined it.

Even had there been no testamentary deeds whatever, and had the question arisen between the heir and executor of Mr. Yeats ab intestato, the very peculiar destination which exists in the present case as to this deposited money would have entitled the heir-at-law to have insisted upon its being applied in extinction of the price of Shuna.<sup>1</sup>

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

It is true, that in the ordinary case where the price is converted into a real burden, at the instance, and for the ends of the purchaser, it might be said that the heir, and not the executor, must pay it. The purchaser, in such a case, is in the same situation as one who borrows money upon his estate. By so doing, he knows that the debt becomes the debt of his heir, and the law necessarily gives effect to this destination against the heir, just as in the other case it gives effect to the correspondent contrary destination against the executor.

But here the postponed payment of the price was not rendered necessary for any end, or from any fault of Mr. Yeats. It was a thing that he could not avoid, inasmuch as it arose wholly from the incapacity of the seller to give an unincumbered title.

This, so far from giving an heritable destination to the price, left it in Mr. Yeats's hands, with as much of a moveable or personal character attached to it as if both parties had been ready, hinc inde, to give and receive instant payment.<sup>2</sup>

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<sup>1</sup> Johnston, 25th February 1783. (Mor. 5,443.) ; Ersk. 2, 2, 14, citing Robertson, 19th January 1637. (Mor. 5,489.) ; Stair, 2, 1, 3. Arbuthnot, 23d June 1773. (Mor. 5,225.) ; M'Nicol, 16th June 1814. (Fac. Coll.) ; Dick, 4th July 1828. (S. D.) Clayton, 3d March 1826, 2 W. S. 44.

<sup>2</sup> Waugh, 17th Feb. 1676. (Mor, 5,453.)

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

But it might even be conceded that, in the outset, the obligation to pay the price was of an heritable character. That it was originally by Mr. Yeats's fault, and not by that of the seller, that any arrangement for giving to it an heritable character became necessary.

This, however, would only bring the operation of the respondent's argument down to the stipulated term of payment, at Candlemas 1819. For, whatever was the previous character of the liability, there can be no doubt whatever that Mr. Yeats was entitled to pay up and discharge the debt at the stipulated term of payment; and that, therefore, when this payment was tendered, and would not, or could not be received, the sum so appropriated became heritable destinatione, and no longer formed a part of the moveable estate descending to the executor.

From the moment a tender of payment has been made, and much more from the moment that the fund has been actually placed in deposit, or consigned in bank, and set apart from the debtor's other estate, with a view to such payment and extinction, the fund becomes heritable destinatione. The executor, if the original debtor dies whilst the money remains in this situation, is not entitled to demand it as a portion of the executry; but, on the contrary, the heir who would have benefited by the payment, if the creditor's refusal or incapacity to receive payment had not rendered consignation unavoidable, is entitled to insist that he shall not be deprived of this benefit through the act of the creditor, but, on the contrary, that the deposited fund shall be applied to the purpose for which, from the moment of its deposit, it had been destined, viz., the



payment and extinction of that heritable debt which would otherwise fall a burden upon him as heir.

A very satisfactory illustration of this principle is to be found in the recent case of *E. Minto v. Elliot*, where it was decided that the debtor in an heritable debt, having sold a part of his landed estate, and invested a portion of the price in the public funds, and intimated to the heritable creditor his intention of paying the debt in six months, but having died before the expiration of that period, and consequently before payment, his residuary legatee was not entitled to take the investment in the public funds as a part of the free succession, leaving the unpaid heritable debt a burden upon the heir, but was bound, out of the amount, to free and relieve both the landed estate and the heir of the heritable debt in question. <sup>1</sup>

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

LORD BROUGHAM,—My Lords, it is not my intention at present to state to your lordships the grounds upon which I may be disposed to advise you in dealing with this case, because I consider the points raised to be very material to the law of Scotland. The case is material enough to the parties, for there is some 6,000*l.* in dispute; but it is so much more material to the law of Scotland and the practice of the Scotch Courts,—among other things, with respect to the admission and rejection of evidence, and therefore material as to the supposed conflict in the practice of the two countries, and especially as there is a legislative measure now in progress for amending the English law on this matter,

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<sup>1</sup> *E. Minto*, 4th Feb. 1823. S. & D.; and affirmed on appeal, 29th June 1825; 1 W. & S. 679.

YEATS  
 v  
 THOMSON  
 and others.  
 —  
 5th June 1835.

that I think it requires further consideration, if not upon the ground of the decision to be pronounced (upon which, I confess, I feel very little, if any, doubt), but at least on the manner in which I should state my reasons to your lordships; for I shall adopt on this occasion,—as I have done in all the other cases that I have helped your lordships to decide here in the course of this session,—the plan of reducing my reasons into writing, in order that they may be furnished to the parties, and taken to the Court below. My Lords, another reason, besides the importance of the matter, for which I wish to reduce my reasons into writing, and to postpone the further consideration of this question, is,—though the subject is of great importance,—though some parts of it are not without difficulty,—though undeniably the decision, if pronounced, will be for the first time pronounced in this House upon those points,—though undeniably, also, the decision upon the same points in the Court below has been pronounced for the first time, either in any court of England or any court of Scotland;—though, therefore, these points are matters of the very first impression in this case, I desiderate what is a great help to any court,—a great comfort to any court of review dealing with the judgment of a court below brought before it by appeal,—I desiderate the reasons of the learned judges who pronounced the decision in the Court below. I find four learned judges have given their opinions, but not one of them has given one tittle of reason for stating those opinions. It is very true, that in former times the reports of the Faculty Collectors (what is called the Faculty Collection) used not to give any but the argument on each side of the bar, and used not to give any

report of the reasons upon which the learned judges grounded their opinions; but, in that case, although the Faculty Collection contained none, the profession had access to the reasons, they were given in open court, they were taken notes of by the bar, as well as by the members of the bench itself; and many of those collections have afterwards seen the light, giving the decisions with the reasons, although the Faculty Collections omitted to give those reasons. I need only refer to the valuable work of my Lord Hailes, which contains large, and I think most voluminous decisions, with the reasons given by the court, some of those reasons exceedingly important and very beneficial to the students of the law, as well as useful to the courts which have to administer that law in after-times. The grounds of the decision were known to the profession,—not so well known, nor so well preserved, as they would be if the Scotch reporters kept the rule which we follow here of recording the reasons of the bench as well as the bar in their collection of reports; but of late years that practice, that silence of the reporters, has been broken,—that practice of omitting the reasons has been altered; and of all the cases decided in Scotland, however unimportant, however trifling in point of amount, and however easy in point of law, there is not now, I believe, a single decision of the Court of Session which does not find its way into the Scotch volumes of reports, if not of the Faculty Collectors, at least of the other reporters of the decisions; and reporting seems to have prevailed in Scotland, and to pervade the profession there, as much as it does the profession here. Therefore, it makes the regret I feel the greater, that now that we have the reasons recorded by the reporters, the

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1895.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

reasons should not, in so important a case as this, have been given by the very learned persons who disposed of this case. It is very much to be regretted, because one is very desirous to know the practice of the Court of Session. The question that arises here, and which brings the laws of the two countries into conflict, is this first and general question, Shall the Scotch practice or the English practice respecting the law of evidence, as well as the Scotch principle or the English principle in respect of the construction of the instrument, prevail as the governing rule for this question? That is the first and general question; for that one should look to the opinions of learned judges for their reasons, to know the view they take of so important a matter. But that is not the only question; there is another, and a much more material one, and without which the application of former to recent cases would not be had, and that is this, upon which, above all things, it was material to know the views of the Scotch judges. Granting that the Scotch law is to prevail in construing the instrument, and the Scotch practice of admitting or rejecting evidence,—granting that to prevail, and not the English, what is the Scotch practice, and what is the Scotch law,—the Scotch law respecting construction, and the Scotch law respecting the admission or rejection of evidence? I desiderate the statement, the authority, the authentic, and consequently the most valuable statement which can be had as to what is the Scotch law and the Scotch practice, but particularly the Scotch practice as to admitting or rejecting evidence,—I desiderate that the more, because one wishes to know how these things are dealt with there, and one wishes to see exactly what the difference is, and upon the highest authority, as

between the Scotch and English courts, in the administration of the important law of evidence. However, we are left unfortunately without any lights from that quarter from which, above all others, I should wish to receive them; and that is an additional reason for wishing your lordships to postpone the further consideration of this case, I am very far from complaining that the learned judges do not give their reasons; but I am only applying to the Court of Session a regret and a complaint which has been felt and urged for the last fifteen years, indeed I may say more, against the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer in Westminster Hall,—that when cases are sent to them from the Court of Chancery, they certify their opinion, and certify no reasons. That has been matter of great regret, and has been the subject of much complaint for the last fifteen or twenty years, which I myself have certainly very often urged in this place, as well as the Court of Chancery. I believe, of late, the practice has been altered, and the old and the sound method has been reverted to, of giving reasons, even in a certificate,—the ground for refusing to give reasons having been, that Chancellors were apt to carp at the reasons, and the Courts did not like being cavilled at; but the answer to that was, that, although that might save their being cavilled at in one case in fifty, namely, when the case was brought back to the court which sent it, it never could save the reasons being cavilled at by every other court, and by all the other counsel, in the other forty-nine cases, where they habitually give their reasons, and which cases, with the reasons, are habitually cited, and sometimes treated in that sort of way by the freedom of

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1895.

discussion which, as applied to the bench, and to all other persons, is the most wholesome mode of dealing with all important subjects, and which must cease to be applied to the bench if the bench wraps itself up in impenetrable mystery and unapproachable dignity, and refuse to be dealt with like the rest of mankind, while at the same time they will not become infallible, which I at present am willing to admit they are not. Therefore, I do regret in other cases, as well as in this, that the reasons are not given, wishing by no means to lay it down as a general rule, that they ought always to argue cases at length; still I think, when a case is important and novel, the least one can expect is, that they should state the grounds on which, in a decision upon novel points, they proceed. For these reasons, I shall feel it more necessary to give my reasons, and I shall beg your lordships to postpone, for that purpose, the further consideration of this case.

On a future day, LORD BROUGHAM read his opinion as follows :—

My Lords, the question which I considered it right to give reasons upon in this case, relates rather to the first than to the second part of the subject, as taken in the order of the argument at the bar: The manner in which the instruments executed in England by a domiciled Englishman are to be construed and dealt with in respect of evidence by a Scotch court, in so far as these instruments relate to the distribution of personal property situated within the territory of Scotland, rather than the question of valid or effectual appropriation. James Yeats, merchant in London, and residing always in England, had purchased the island of Shuna,

one of the Hebrides, at the price of 10,500*l.*, of which only 5,000*l.* was, by agreement, left as a burden upon the estate. The transaction took place in 1815, and at Candlemas 1819 the remaining part of the price was to be paid, the parties having no doubt of the seller being able to clear off the incumbrances before that time. Meanwhile, an heritable bond was granted for that residue, and was duly recorded, so as to constitute an effectual lien by the laws of Scotland. At the stipulated period, the 2d of February 1819, the payment of the bond was tendered, but the seller was still unable to give a clear title, and Mr. Yeats accordingly consigned the money with the bank of Scotland. Before this period the rights of the vendor had been transferred to the Leith Banking Company, who now stood in his shoes, and to whom, accordingly, Mr. Yeats's agents gave notice of the consignment, in order that their client might be relieved from any claim of interest after the consignment was notified. The bank acted upon this notice; for Mr. Yeats having intimated to them that they might draw out a sum of the deposit, equal to the debts upon the estate which they should pay off and produce discharges for, they actually paid off 4,000*l.*, or, at least, produced discharges to that amount, and received so much of the fund out of the bank, leaving only 1,649*l.* 2*s.* 5*d.*, the balance still deposited, and now in dispute. The deposit had originally been made in the name of Mr. Rose, as a kind of trustee or stakeholder for all parties; but in August 1826 it was, at Mr. Rose's desire, transferred to Mr. Yeats's own name, and in April 1828 the first of the instruments in question was executed. I shall here only stop to observe, that the whole course of the trans-

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1895.

action, as I have stated it, from the facts admitted on all hands, plainly shows Mr. Yeats's desire from the beginning to finish the affair,—to pay the price,—to receive the title and possession, and his intention of keeping the whole business apart from his general concerns; nor can any thing be more contrary to probability than the supposition that he should allow it to be mixed up with the arrangement of his affairs, and to influence the testamentary disposition of his property. With this strong probability arising from the conduct of the parties, and from the course of the transactions generally, we come to consider that which forms the whole question in the cause: Whether any appropriation of the fund deposited with the Bank of Scotland was effectually made by Mr. Yeats? And, first, let us see how far the trust disposition of the 1st of April 1829 will carry us, without any regard to the will of the year before. The island of Shuna seems to be the subject of that deed; the maker having probably discovered, since April 1828, that the devise of real property situated in Scotland, which he had in that will endeavoured to make by executing it so as to pass lands in England, was wholly ineffectual for his purpose. He appears, however, to have deemed that will sufficient for executing his intention respecting his personality as connected with the island, as it indeed was while unrevoked; and accordingly it is said that he rather refers to it as having declared those intentions, than repeals his declarations. I cannot, however, either consider the passage of the trust deed to which I am alluding as a mere reference to the will, nor can I think, even if it were, that this circumstance would destroy its force. If it were a mere reference, nothing



is more certain than that, by words of recital, you may validly bequeath or devise, and that saying you have done so, if you say it distinctly, is as valid a gift as if there was no reference or recital in the passage at all.

But granting that the subsequent cancelling of the will to which reference is made would have the effect of cancelling also this reference, the last words of the passage appear substantive, and not relative to the will :

“ Now, if this transaction should not be closed before  
 “ my death, I have, in a separate will which respects  
 “ my property in England, directed my trustees or  
 “ executors in that will to assign or indorse the notes  
 “ or receipts of the Royal Bank to my said trustees, the  
 “ Lord Mayor and Bailies, to be kept by them in the  
 “ same depository where they now are till the above  
 “ defects are cured, and till the entry stipulated to be  
 “ made with the superior is implemented; or if the  
 “ latter is called for before the titles are purged, it  
 “ may, with no impropriety, be taken from the sum in  
 “ deposit.” These words, “ or if the latter,” &c. do not, in form, relate to the will previously made; but, what is of more importance, they contain a direction, or the declaration of an intention nowhere to be found in the will. They are, therefore, an addition to the declaration there contained. But let us consider the last will which was admitted to probate. It is dated 17th April 1829, less than three weeks after the trust disposition, and it clearly refers to the English property only,—he considered that in the trust deed he had disposed fully of his Scotch property,—and the will is addressed to the English. This circumstance, and the express reference to the provision of the deed in the will, appear to me sufficient to render them both parts

YEATS  
 v.  
 THOMSON  
 and others.  
 —  
 5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

of one conveyance ; for he says, “ It may be proper to  
“ observe, that by a will made in this present month  
“ and year I have disposed of the island of Shuna in  
“ Argyllshire ;” and he expressly mentions his “ stock  
“ of cattle, and other effects in Shuna,” as part of the  
residue. Now, supposing this last will to have, which  
it undoubtedly has, generally speaking, the effect of  
revoking the first will, it seems by no means so clear  
that it revokes whatever part of that first will is, by  
reference to it in the trust deed, re-published and im-  
ported into that trust deed ; for the sounder view of the  
matter seems to be, that the trust deed and the will of  
1829 being taken as one, the will 1829 only revokes  
so much of the will 1828 as is not imported into or  
referred to by the deed. Indeed, if the disposition  
and last will be regarded as one conveyance, the last  
will no more revokes the part of the disposition refer-  
ring back to the generally revoked will 1828, than if  
the reference had been contained in the last will—that  
of 1829. This consideration goes far to satisfy me,  
that the revocation operated by the last will, after the  
date of the trust disposition, renders the passage in the  
disposition, which refers to the will of 1828, substan-  
tive and not relative, and prevents the general revoca-  
tion, subsequently effected, from having any force to  
destroy the import of that passage as a valid declaration  
of the testator’s intention. It might even be argued,  
that you would, upon this ground, have a right  
in our courts, and according to our strict prac-  
tice, to look at the revoked will by means of the  
reference, first in the trust deed to that will, and  
next in the last will to the trust deed. But this  
needs not now be considered. Although, therefore, I

am of opinion that there is no necessity for admitting the first will in order to dispose of this case and to support the decree below, yet the importance of the question connected with its admission in evidence is sufficient to require that I should state in what light I view it. It is on all hands admitted, that the whole distribution of Mr. Yeats's personal estate must be governed by the law of England—his domicile through life, and both at the time of his decease and at the date of all the instruments executed by him. Had he died intestate, the English statute of distributions, and not the Scotch law of succession in moveables, would have regulated the whole course of the administration. His written declarations must therefore be taken with respect to the English law. I think it follows from hence, that those declarations of intention touching the property must be construed, as we should construe them here, by our principles of legal interpretation. Great embarrassment may no doubt arise from calling upon a Scotch court to apply the principles of the English law to such questions, and those principles, many of them among the most nice and difficult known in our jurisprudence. The Court of Session may, for example, be required to decide whether an executory devise is void as being too remote, and required to apply, for the purpose of ascertaining this, the criterion of the gift passing or not passing what would be an estate tail in reality, although, in the language of the Scotch law, there is no such expression as executory devise, and, within the knowledge of Scotch lawyers, no such thing as an estate tail. Nevertheless, this is a difficulty which must of necessity be grappled with, because in no other way can the English law be applied to personal property situated

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1895.

locally within the jurisdiction of the Scottish forum ; and the rule which requires the law of the domicile to govern such succession could in no other way be applied and followed out. Nor am I aware that any distinction in this respect has ever been taken between testamentary succession and succession *ab intestato*, or that it has been held either here or in Scotland, that the court's right to regard the foreign law was excluded, wherever a foreign instrument had been executed. It is therefore my opinion, that in this, as in other cases of the like description, the Scotch court must inquire of the foreign law, as a matter of fact, and examine such evidence as will show how in England such instruments would be dealt with as to construction. I give this as my opinion upon principle, for I am not aware of the question ever having received judicial determination in either country. But here, I think, the importation of the foreign code (sometimes incorrectly called the *Comitas*) must stop. What evidence the courts of another country would receive, and what reject, is a question which I cannot at all see the necessity of. The courts in any one country entering into those principles which regulate the admission of evidence, are the rules by which the courts of every country guide themselves in all their inquiries. The fact, the truth with respect to men's actions, which forms the subject matter of their inquiry, is to be ascertained according to a certain definite course of proceeding ; and certain rules have established, that, in pursuing this investigation, some things shall be heard from witnesses, others not listened to, — some instruments shall be inspected by the judge, others kept from his eye. This must evidently be the same course, and governed by the same rules, whatever

be the subject matter of investigation ; nor can it make any difference whether the facts concerning which the discussion arises happened at home or abroad,—whether they related to a foreigner domiciled abroad, or a native living and dying at home. As well might it be contended that another mode of trial should be adopted, as that another law of evidence should be admitted in such cases. Who would argue that, in a question like the present, the Court of Session should try the point of fact by a jury, according to the English procedure, or should follow the course of our depositions or interrogatories in courts of equity, because the testator was a domiciled Englishman, and because those methods of trial would be applied to his case were the question raised here. The answer is, that the question arises in the Court of Session, and must be dealt with by the rules which regulate inquiry there. Now, the law of evidence is among the chief of these rules. Nor let it be said that there is any inconsistency in applying the English rules of construction, and the Scotch ones of evidence, to the same matter, in investigating facts by one law, and intention by another. The difference is manifest between the two inquiries; for a person's meaning can only be gathered from assuming that he intended to use words in the sense affixed to them by the law of the country he belonged to at the time of framing his instrument. Accordingly, where the question is, what a person intended by an instrument relating to the conveyance of real estate situated in a foreign country, and where the *lex loci rei sitæ* must govern, we decide upon his meaning by that law, and not by the law of the country where the deed was executed, because we consider him to have had that

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1895.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

foreign law in his contemplation. The will of 1828 has not been admitted to probate here,—it has not even been offered for proof; consequently there is no sentence of any court of competent jurisdiction upon it either way. But in England it never could be received in evidence, nor seen by any court: so, however, neither could it be seen even if it had been proved ever so formally. Our law holds the probate as the only evidence of a will of personality, or of the appointment of executors; in short of any disposition which a testator may make, unless it regards his real estate. Can it be said that the Scotch court is bound by this rule of evidence, which though founded upon views of convenience, and, for any thing that I know to the contrary, well devised, is yet one which must be allowed to be exceedingly technical, and which would exclude from the view of the court a subsequent will, clearly revoking the one admitted to probate? The English courts could never look at this, although proof might be tendered that it had come to the knowledge of the party on the eve of the trial. A delay might be given, to enable him to obtain a revocation of the probate; but for that time, at least, the proceeding must either go upon the wrong will, or be delayed altogether, and at the cost of the party who is in the right by the supposition. It is absurd to contend that the Court of Session shall admit all this technicality of procedure into its course of judicature as often as a question arises upon the succession of a person domiciled in England. Again, there are certain rules just as strict, and many of them not much less technical, governing the admission of parole evidence with us. Can it be contended, that as often as an English succession comes in question before the

Scotch court, witnesses are to be admitted or rejected upon the practice of the English courts; nay, that examination and cross-examination are to proceed upon those rules of our practice, supposing them to be (as they may possibly be) quite different from the Scotch rules? This would be manifestly a source of such inconvenience as no court ever could get over. Among other embarrassments equally inextricable, there would be this, that a host of English lawyers must always be plying in the purlieus of the Scotch courts, ready to give evidence at a moment's notice of what the English rules of practice are touching the reception or refusal of testimony, and the manner of obtaining it; for those questions, which by the supposition are questions of mere fact in the Scotch courts, must arise unexpectedly during each trial, and must be disposed of on the spot, in order that the trial may proceed. The case which I should however put, as quite decisive of this matter, comes nearer than any other to the one at the bar; and it may with equal advantage to the elucidation of the argument be put as arising both in an English and in a Scotch court. By our English rules of evidence no instrument proves itself unless it be thirty years old, or is an office copy, authorized by law to be given by the proper officer, or the London Gazette, or is by some special act made evidence, or is an original record of a court under its seal, or an exemplification under seal, which is quasi a record. By the Scotch law all instruments prepared and witnessed according to the provisions of the Act 1681 are probative writs, and may be given in evidence without any proof. Now suppose a will of personality, or any other instrument relating to personal property, attested by two witnesses, and executed in

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

England according to the provisions of the Scotch Act, is tendered in evidence before the Court of Session, it surely never will be contended that the learned judges, on being satisfied that the question related to English personal succession, ought straightway to examine what is the English law of evidence, and to require the attendance of one or other of the subscribing witnesses, when the instrument is admissible by the Scotch law as probatio probata. Of this I can have no doubt. But suppose the question to arise in England, and that the deed is executed in Scotland, according to the Act 1681, by one domiciled there, would any court here receive it as proving itself, being only a year old, without calling the attesting witnesses? It would have a strange effect to hear the circumstance of there being two subscribing witnesses to the instrument, which makes it prove itself in the Parliament House of Edinburgh, urged in Westminster Hall as the ground of its admission, without any parole testimony. The court would inevitably answer,—Two witnesses. Then, because there are witnesses, it cannot be admitted; but they must one or other of them be called to prove it. The very thing that makes the instrument prove itself in Scotland, makes it in England necessary to be proved by witnesses. I have therefore no doubt whatever, that the rules of evidence form no part of the foreign law, according to which you are to proceed in disposing of English questions arising in Scotch courts. It by no means follows from hence, that where a sentence of a foreign court is offered in evidence,—the probate, for example, of an English will,—it should not be admitted; nor do I think it should be denied its natural and legitimate force; but that it



must, like all other instruments, be received upon such proof as is required by the rules of evidence followed by the court before which it is tendered, I hold to be quite clear. It will follow, that though a probate striking out part of a will would be received, (and the Court of Session would have no right to notice the part struck out, for this would be reversing, or at least disregarding the very sentence of the court of probate,) yet the non-probate of a person's will could not prevent the court from receiving and regarding it, if its own rules of evidence did not shut it out. It is unnecessary here to decide what would be the course in the Scotch courts were an English will of personality in question, attested by one witness, after an Act should have passed requiring two. I think that though it must be admissible in evidence, by the rules of evidence which then govern, yet that no effect could be given to its disposition, because of the rules of English law requiring two witnesses,—that being a requisition not of form, in order to make the paper evidence, but of substance in order to protect testators on their dying beds. Upon these principles I am of opinion that the Court of Session had a right to receive and to look at the first will, with a view to examine the testator's intention regarding this fund in medio. Upon the effect of that first will it is unnecessary to dwell further. The trust disposition seems to me a sufficient declaration of intention to appropriate. But the will leaves that intention free from all doubt. No doubt if that will was revoked by the subsequent one of April 1829, there would be an end of such a declaration in Scotland as well as in this country. But I have stated why I think the trust deed, and even the connexion between

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1835.

YEATS  
v.  
THOMSON  
and others.  
—  
5th June 1895.

that and the last will, cannot be regarded as revoking any intention respecting the fund and the island expressed in the earlier will; and why quoad that intention, it cannot be held revoked. The whole course of the transaction, and the whole circumstance of the parties, confirm this view of the case. Under these circumstances, I move your lordships that the judgment of the Court below be affirmed, but without costs.

The House of Lords ordered and adjudged, That the said petition and appeal be, and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be, and the same are hereby affirmed.

A. H. M'DOUGAL—RICHARDSON and CONNELL—  
GEO. WEBSTER, Solicitors.

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# INDEX OF MATTERS

IN

## VOLUME I.

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### AGENT AND CLIENT.

Circumstances under which, although the accounts of a law agent, which had been rendered with a view to an extra-judicial settlement, were remodelled when the client required a taxation, and the remodelled accounts contained fictitious charges, (but which had been inserted by a third party employed to remodel them, and were afterwards withdrawn,) and 219*l.* was taxed off 819*l.*, the House of Lords affirmed with variations the judgment of the Court of Session, decerning for the balance with expenses. *M'Aulay v. Adam and Brown*, May 7, 1835, p. 665.

### APPEAL.

Question, whether, where no objections are lodged to an auditor's report as to taxation of accounts, and an appeal is entered against the judgment of the Court approving of that report, it be competent to enter on the merits in the House of Lords; and if not so, whether, the only other question being one of costs, an appeal be competent? *M'Aulay v. Adam and Brown*, May 7, 1835, p. 665.

See *Process*, 1.

### ARBITRATION.

An action of count and reckoning, concluding for 500*l.*, or such other sum as should be found to be the balance due, was judicially referred, with a declaration that the referee should ordain the losing party to pay all costs; and the referee found the pursuers entitled to 4*l.* 3*s.* 11½*d.* as the balance unaccounted for on transactions to the amount of 45,542*l.*, but declared the pursuers to be the losing parties, and liable in expenses:—Held (affirming the judgment of the Court of Session) that the award was not ultra vires; but declaration added (by the House of Lords) that the judgment should not be drawn into a precedent on the general meaning of the words "losing party." *Gye and Co. v. Hallam*, May 15, 1835, p. 747.

**BANKRUPT.** See *Cautioner, Liberation of.—Trust.*

## INDEX OF MATTERS.

### **BANKRUPTCY.**

1. (1.) Circumstances under which a transaction entered into by creditors on a sequestrated estate, for taking a lease of part of a coal field adjacent to and forming part of a coal field belonging to the bankrupt, with a view to the beneficial working of the coal, was, in a question with the bankrupt and his wife as a contingent creditor, sustained.

(2.) Where a question as to compromising claims on a sequestrated estate, and counter claims by the bankrupt by executing mutual discharges, had been repeatedly under consideration of meetings of creditors, and the matter was adjourned for further consideration, an objection by the bankrupt and his wife to a resolution of a meeting of the creditors to enter into the compromise, that the advertisement did not specially bear that the meeting was called for this purpose, repelled. *Taylor v. Kerr*, April 8, 1835, p. 94.

2. A party lent a sum of money on the security of a property which he was led to believe extended to ninety-five acres, but which, from the terms of the description, embraced only five acres; and after the borrower was bankrupt, and his estates had been sequestrated, and a trustee confirmed, and he had fled to another country, the lender obtained from him an heritable bond, embracing the lands originally intended to have been conveyed in security, on which infestment was taken before the trustee was infest:—Held (affirming the judgment of the Court of Session) that the heritable bond so obtained was inept in a question with the trustee. *Inglis, &c. v. Mansfield*, April 10, 1835, p. 203.

### **CAUTIONER, LIBERATION OF,**

Circumstances in which held (reversing the decision of the Court of Session) that the cautioner for the trustee on a sequestrated estate was not liberated by alleged neglect on the part of the commissioners in detecting fraud and malversation on the part of the trustee. *M'Taggart, &c. v. Watson*, April 16, 1835, p. 553.

**CLAUSE.** See *Arbitration*.—*Entail*, 3, 4.—*Foreign*.—*Heir and Executor*.—*Husband and Wife*, 2.

**COAL.** See *Lease*, 1.

**COLLATION.** See *Succession*.

**DEED, CONSTRUCTION OF.** See *Foreign*.

### **ENTAIL.**

1. The prohibitory clauses of an entail being directed against the institute and the other heirs of tailzie, but the irritant clause being only directed against the debts and deeds of "the said heirs of tailzie," without specifying the institute:—Held (affirming the judgment of the Court of Session) that it was lawful for the institute to sell. *Lord Elibank, &c. v. Murray*, March 19, 1835, p. 1.

## INDEX OF MATTERS.

### ENTAIL (Continued.)

2. An entailer in his deed of entail, by a clause immediately following the destination, declared that the burdens, reservations, conditions, provisions, restrictions, limitations, and clauses irritant therein-after expressed should be binding on the institute as well as the substitutes; and the prohibitory clauses against selling, burdening, or altering the order of succession were directed against the institute as well as the substitutes; but certain other prohibitory clauses and the whole of the irritant and resolute clauses were directed against the "heirs of tailzie" only, without mentioning the institute:—Held (reversing the decision of the Court of Session) that the entail was ineffectual to prevent the institute from selling the lands and disposing of the price at pleasure. *Morehead v. Morehead, &c.*, March 31, 1835, p. 29.
3. Circumstances in which held (reversing the judgment of the Court of Session) that the syntax of the irritant clause of an entail being defective, from a clerical omission which might by possibility have been supplied by other words than those which the context indicated to have been intended to be inserted, the entail was insufficient to prevent the heir in possession from selling or burdening the lands. *Sharpe v. Sharpe, &c.*, April 18, 1835, p. 594.
4. Under a strict entail containing clauses against contracting debts, &c., "but excepting and reserving furth and from the said clause irritant full power and liberty" to the heirs of tailzie "to take on debts for the provision of their younger children, not exceeding three years free rent of the lands and others foresaid, after deduction of liferents and real debts," &c.:—Held (affirming the judgment of the Court of Session), (1.) That the heir in possession might grant provisions to his younger children to the extent of three years free rent, payable at the first term after the failure of heirs male of his body, when the lands should devolve on an heir not descended of him: And, (2.) That the parties in right of the provisions might recover them from the heir in possession, with interest from the time the provision fell due, although that heir was not descended from the grantor, and had not succeeded to the lands at the time the provisions became payable. *Porterfield v. Howden*, May 14, 1835, p. 739.

See *Succession*.—*Teinds*.

EXCAMBION. See *Teinds*.

EXPENSES. See *Arbitration*.

### FISHING.

Question, whether stake-nets placed on sand banks adjacent to the river Nith fall under the exception of the statute 1563, c. 68, as to cruives and yairs upon the water of Solway. *Oswald, &c. v. M'Whir*, April 13, 1835, p. 393.

## INDEX OF MATTERS.

### FOREIGN.

A domiciled Englishman, who was debtor in an heritable bond over a Scotch estate, the contents of which bond he had consigned in the Bank of Scotland, having executed an English will, by which he declared that the consigned sum should belong to certain trustees; having thereafter executed a Scotch trust deed and settlement, in which he stated that he had, in a separate will as to his property in England, directed that the consigned sum should be transferred to his trustees; and having thereafter executed another English will, which had the effect generally of revoking the first will, and which bequeathed all his personal estate to an executor:—Held (affirming the judgment of the Court of Session,) 1. That the Scotch Court had a right, and were bound to look at the first will in the same way as it would have been looked at in England, in order to discover the testator's intentions as to the consigned sum. 2. That the deeds contained a sufficient declaration of the intention of the testator to appropriate the consigned sum to his trustees; and, therefore, that the trustees fell to be preferred to that sum, and not the executor. *Yeats v. Thomson, &c.*, June 5, 1835, p. 795.

### HEIR AND EXECUTOR.

A party possessed of two estates, the one of which he held in fee simple, and the other under an entail, which allowed reasonable provisions for younger children, having bound himself, and his heirs succeeding to these two estates, to pay certain provisions to his younger children; and the first heir who succeeded to these estates having possessed them without paying the provisions:—Held (affirming the judgment of the Court of Session) that the second heir succeeding to these estates was liable, without relief against the executors of the first heir. *Lord M'Donald v. M'Donald*, April 13, 1835, p. 341.

HERITABLE BOND. See *Trust*.

### HUSBAND AND WIFE.

1. A husband was proprietor of an estate subject to payment of the price to three heirs portioners, one of whom was his wife; he granted an heritable bond and disposition in security to a creditor, and the wife assigned in further security her one third share and interest thereof. The husband having become bankrupt, and there being a deficiency in the price, held, in a question between the two heirs portioners, and the creditor as assignee of the wife, (affirming the judgment of the Court of Session,) that the two heirs portioners were preferable to the interest of her third share, to the effect of recovering full payment of their respective shares. *Napier v. Glendonwyn, &c.*, April 13, 1835, p. 374.
2. A husband by antenuptial contract of marriage having conveyed his "half of the nine-shilling-and-ninepenny land of old extent "in the Garth quarter called Bullshill" to himself and his promised spouse "in conjunct liferent during all the days of their

## INDEX OF MATTERS.

### HUSBAND AND WIFE (Continued.)

“ lifetime, and to the longest liver of them, and their heirs or assignees in fee.”—Circumstances in which held (affirming the judgment of the Court of Session) (1). That the conveyance comprehended the whole lands in the Garth quarter belonging to the husband, being the half of a nine-shilling-and-ninepenny land, which half was called Bullshill. (2.) That the wife having survived the husband the fee was in her. *Forrester v. Trustees of Macgregor or Forrester*, April 13, 1835, p. 441.

**HYPOTHEC.** See *Lease*, 2.

### INTEREST.

Interest allowed on the consideration awarded from the date of the summons. *E. of Elgin v. Sir C. Halkett, Bart.*, April 16, 1835, p. 629.

### LEASE.

1. (1.) Circumstances in which the tenant of two separate coal fields (between which a coal field of his own was situated), with a right to the use of a level for working the fields let to him, was held (affirming the judgment of the Court of Session) liable to pay the landlord a consideration for the benefit which the tenant derived from carrying the level through his own interjected field in passing onwards to the upper coal field let to him. (2.) In estimating the benefit so derived it is competent to take into view the facilities which the tenant enjoyed as to draining his own field, either from the porous nature of the strata, or the possession of another level. *E. of Elgin v. Sir C. Halkett, Bart.*, April 16, 1835, p. 629.

2. A proprietor let premises for a manufactory, and bound himself to communicate to them a supply of steam power by means of a shaft from an engine in adjoining premises belonging to him, and to furnish a supply of water; and the rent for the premises was fixed, but the amount of the consideration for the steam power and water was left to the determination of arbiters: Held (reversing the judgment of the Court of Session) that his right of hypothec over the *invecta et illata* in the premises let, covered only the specific rent fixed for these premises, and not the additional rent stipulated for the steam power and water. *Catterns v. Tennent*, May 12, 1835, p. 694.

**LIFERENT AND FEE.** See *Husband and Wife*, 2.

### POOR.

Held, (reversing the judgment of the Court of Session,) in a question between the heritors of a landward district and the magistrates of a royal burgh, both situated within one and the same parish, that the management and maintenance of the poor of the landward district were not separate from the management and maintenance of the poor within the burgh, but that the poor of both districts must be regarded as the poor

## INDEX OF MATTERS.

### **POOR (Continued.)**

of one parish. *The Magistrates of Dunbar v. The Heritors of Dunbar*, April 10, 1835.

### **PROCESS.**

1. A proof was taken before the bailies of a burgh, and in an advocacy the Lord Ordinary pronounced a special judgment on the facts; a relative action of declarator was brought by the advocator, and of consent of parties the proof was held as repeated in the declarator, and the processes were conjoined, and the respondent was assoilzied. An objection by the respondent to an appeal entered in the conjoined processes that it was incompetent under 6 Geo. 4. c. 120. s. 40. sustained in so far as the appeal related to the matters of fact. *Jack v. Lyall*, April 1, 1835, p. 77.
2. Circumstances under which a special case, which was substituted by agreement of parties for a verdict, was insufficient to afford grounds for pronouncing judgment; and a remit made to the Court of Session to cause an issue to be sent to a jury. *Oswald, &c. v. M'Whir*, April 13, 1835, p. 393.
3. After a remit had been made to a judicial inspector to report, and he reported, a remit to the Jury Court refused. *E. of Elgin v. Sir C. Halkett, Bart.*, April 16, 1835, p. 629.

### **PROOF.**

1. Parole proof to control the terms of a written agreement refused to be admitted.

Circumstances under which two defenders were held (affirming the judgment of the Court of Session) bound under an agreement with a pursuer in mutual relief of a claim of damages, although it was afterwards proved that neither party was the cause of the damage. *Johnston v. Edinburgh and Glasgow Canal Co.*, April 9, 1835, p. 117.

2. Circumstances under which the partners of a joint stock company were held (affirming the judgment of the Court of Session) to be competent witnesses in a question, whether a partner had purchased shares for behoof of another person, who alleged that he had been deceived by misrepresentations to agree to purchase. *Syme v. Brown*, May 12, 1835, p. 723.

**PROVISIONS TO CHILDREN.** See *Entail*, 4.

**RELIEF.** See *Heir and Executor*.

**REMUNERATION.** See *Lease*, 1.

**RIGHT IN SECURITY.** See *Husband and Wife*, 1.

**SEQUESTRATION.** See *Bankruptcy*, 1.—*Trust*.

### **SERVITUDE.**

Circumstances in which a servitude of eavesdrop was sustained in favour of one party over the property of another. *Jack v. Lyall*, April 1, 1835, p. 77.



## INDEX OF MATTERS.

STAT. 1696. c. 5. See *Bankruptcy*, 2.

STAT. 54 GEO. 3. c. 137. See *Bankruptcy*, 2.

### SUCCESSION.

Question remitted for further consideration to the Court of Session, whether an heir succeeding to entailed estates as heir substitute by the death of a preceding heir, is entitled, as one of the nearest of kin of the deceased, to participate in his moveable succession with another of the nearest of kin, without collating the entailed estates. *Anstruther v. Anstruther*, April 15, 1835, p. 463.

### TEINDS.

An excambion was made under the statute 10 Geo. 3. c. 51. between the proprietor of an entailed estate and another proprietor, by which it was declared that all lands given by the entailed proprietor should be held of him for delivery of a certain quantity of meal and payment of a sum of money, "in full of all feu and teind duties;" and the entailed proprietor was titular of the parish, but he did not transact in that character: Held (affirming the judgment of the Court of Session) that under the circumstances the other party was not entitled to insist that the meal and money so payable should be allocated primo loco as free teinds in the titular's hands. *Hamilton v. Duke of Hamilton*, March 31, 1835, p. 65.

### TRUST.

Three trustees, to whom certain heritable subjects had been conveyed, with a power of sale, in relief of obligations undertaken by them, having, in a disposition of part of the subjects, granted in their character of trustees, declared 3,000*l.* of the price to be a real burden, and afterwards taken a bond for that sum payable to them *privatis nominibus*, their heirs and assignees, but without discharging the real burden; having taken a bond for 400*l.* (part of the price of a second portion of the trust subjects) as for cash instantly advanced, payable to them *privatis nominibus*, their heirs and assignees; but having taken a bond for 1,925*l.*, part of the price of a third portion of the subjects, payable to them in their character of trustees; on all of which bonds infestments followed; and one of the trustees having thereafter been sequestrated, and an action of adjudication having been brought by the solvent trustees, to have the three bonds adjudged to them in extinction of the outstanding obligations of the trust, and in order to equalize the superadvances made by them, which greatly exceeded the advances made by the bankrupt trustee: Held, 1. (reversing the judgment of the Court of Session,) that the creditors on the sequestrated estate of the bankrupt trustee were entitled to a third of the 400*l.* bond, as appearing on the face of the records to have been vested in the bankrupt and his co-trustees *privatis nominibus*. 2. (affirming the judgment of the Court of Session,) that the

## INDEX OF MATTERS.

### TRUST (Continued.)

bonds for 3,000*l.* and 1,925*l.* fell to be applied, in the first place, in extinction of the outstanding obligations of the trust estate, and in the second place, in relief of the superadvances of the solvent trustees. *Jeffrey v. Paul*, May 15, 1835, p. 767.

VERDICT. See *Process*, 2.

WARRANTICE. See *Teinds*.

---

# INDEX OF NAMES

IN

## VOLUME I.

<i>Appellants.</i>	<i>Respondents.</i>	Page
Anstruther, Sir W. C.,	Anstruther, Mrs. Marian,	463
Catterns, Samuel,	Tennent, Hugh,	694
Dunbar, Magistrates of,	Dunbar, the Heritors of,	134
Elgin, Earl of,	Halkett, Sir C., Bart.,	629
Elibank, Lord, and Commis- sioners,	Murray, Patrick,	1
Forrester, James,	{ Trustees of Mrs. Mary Mac- gregor or Forrester, }	441
Gye, Frederick, and Co.,	Hallam, Samuel J.,	747
Hamilton, Mrs. Ann,	Hamilton, Duke of,	65
Inglis, Rev. Dr., and Others, (Trustees of the late Josiah Walker,)	Mansfield, Thomas,	203
Jack, John,	Lyall, William,	77
Jeffrey, William,	Paul, Henry,	767
Johnston, George,	{ Edinburgh and Glasgow Union Canal Company, }	117
M'Aulay, Dr. D.,	Adam, J., and D. Brown,	665
M'Donald, Lord,	M'Donald, Hon. Archibald,	341
M'Taggart, John, and Others,	Watson, William,	553
Maxwell, Oswald, and Others,	M'Whir, James,	393
Morehead, William,	{ Morehead, Rev. Dr. Robert, and Others, }	29
Napier, John,	Glendonwyn, Miss, and Others,	374

## INDEX OF NAMES.

<i>Appellants.</i>	<i>Respondents.</i>	<i>Page</i>
Oswald, R. A., and Others,	M'Whir, James,	393
Porterfield, James C.,	Paterson or Howden's Trustees,	739
Sharpe, Lieut. Gen. Matthew,	Sharpe, C. K., and Others,	594
Syme, John Hutton,	Brown, Peter,	723
Taylor, William,	Kerr, James,	94
Walker's Trustees,	Mansfield, Alex., Thomas,	203
Yeats, Jacob,	Thomson, Alex., and Others,	795

---

<i>Respondents.</i>	<i>Appellants.</i>	<i>Page</i>
Adam, J., and D. Brown,	M'Aulay, Dr. D.,	665
Anstruther, Mrs. Marian,	Anstruther, Sir W. C.,	463
Brown, D., and J. Adam,	M'Aulay, Dr. D.,	665
Brown, Peter,	Syme, John Hutton,	723
Dunbar, the Heritors of,	Dunbar, the Magistrates of,	134
Edinburgh and Glasgow Union Canal Company,	} Johnston, George,	117
Forrester or Macgregor, Trustees of Mrs. Mary,	} Forrester, James,	441
Glendonwyn, Miss, and Others,	} Napier, John,	374
Halkett, Sir C. Bart.,	Elgin, Earl of,	629
Hallam, Samuel J.,	Gye, Fredrick, and Co.,	747
Hamilton, Duke of,	Hamilton, Mrs. Ann,	65
Howden or Paterson's Trus- tees,	} Porterfield, James C.,	739
Kerr, James,	Taylor, William,	94
Little's Assignee (J.M'Whir,)	Oswald, R. A. and Others,	393
Lyall, William,	Jack, John,	77
M'Donald, Hon. Archibald,	M'Donald, Lord,	341
Macgregor or Forrester, Trustees of Mrs. Mary,	} Forrester, James,	441

## INDEX OF NAMES.

<i>Respondents.</i>	<i>Appellants.</i>	<i>Page</i>
M'Whir, James, (Little's Assignee,)	Oswald, R. A., and Others,	393
Mansfield, Thomas,	{ Inglis, John, and Others, } (Walker's Trustees,)	203
Morehead, Rev. Dr. Robert, and Others,	{ Morehead, William,	29
Murray, Patrick,	{ Elibank, Lord, and Commis- } sioners,	1
Paterson or Howden's Trustees,	{ Porterfield, James C.,	739
Paul, Henry,	Jeffrey, William,	767
Roxburghe, Dowager Duchess of, and Others,	{ Dunbar, the Magistrates of,	134
Sharpe, C. K., and Others,	Sharpe, Lieut. Gen. Matthew,	594
Stuart's Trustee,	Inglis, John, and Others,	203
Tennent, Hugh,	Catterns, Samuel,	694
Thomson, Alex., and Others,	Yeats, Jacob,	795
Watson, William,	M'Taggart, John, and Others,	553

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